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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1977

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and
HERBERT N. SOMEKH,

Petitioners,

against

LEO M. SHORE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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IN THE

Supreme Court of the United States**October Term, 1977**

No.

PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH,
Petitioners,

against

LEO M. SHORE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Petitioners Parklane Hosiery Company, Inc. and Herbert N. Somekh pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on November 1, 1977. Petitioners' petition for rehearing and rehearing en banc was denied by orders dated December 20, 1977.

Opinions Below

The opinion of the Court of Appeals, 565 F.2d 815 (2d Cir. 1977), is annexed hereto as Appendix A, pages 1a-19a.* It reversed the order of the United States District Court for the Southern District of New York which, in upholding Petitioners' constitutional jury trial right

* Citation herein to pages of each appendix will appear as follows: "App. , p. ".

against a claim of collateral estoppel, had denied Respondent's motion for partial summary judgment relating to the question of liability. The opinion of the District Court was not reported. It appears at App. E, p. 26a.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered November 1, 1977. App. B, p. 20a. The petition for rehearing and rehearing en banc was denied by orders dated December 20, 1977. App. C, p. 22a; App. D, p. 24a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did the Court below, in reaching a decision admittedly in conflict with that of the Court of Appeals for the Fifth Circuit in *Rachal v. Hill*, 435 F.2d 59 (1970), *cert. denied*, 403 U.S. 904 (1971), rule erroneously upon an important constitutional question of the right to trial by jury which has not been, but should be, decided by this Court?

2. Did the Court below err in denying Petitioners their Seventh Amendment right to a jury trial of certain issues in this action on the basis of findings made in an earlier-tried non-jury action in which the jury trial right did not exist and to which Respondent was not a party?

3. Can the constitutional jury trial right, preserved by the Seventh Amendment as that right existed in 1791, be destroyed by a post-1791 change in the common law doctrine of collateral estoppel?

4. Does the decision below conflict with the decision of this Court in *Dimick v. Schiedt*, 293 U.S. 474 (1935)?

5. Did the Court below err in concluding that Petitioners lost their constitutional jury trial right in this action as to those issues determined in a Securities and Exchange Commission ("SEC") enforcement action

(a) by not requesting a jury or an advisory jury in the SEC action, notwithstanding the fact that there had never been a right to a jury trial in the SEC action and Respondent had not been a party thereto, or

(b) by not seeking to have this action tried prior to the SEC action, notwithstanding the fact this action could not have been made ready for, and brought to, trial before the trial of the SEC action?

Constitutional Provision and Federal Rules Involved

The Seventh Amendment to the United States Constitution provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rules 39(b) and (c) of the Federal Rules of Civil Procedure provide:

"(b) *By the Court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its dis-

cretion upon motion may order a trial by a jury of any or all issues.

“(c) *Advisory Jury and Trial by Consent.* In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.”

Statement of the Case

This action was commenced on November 13, 1974 by Respondent, a former shareholder of Petitioner Parklane Hosiery Company, Inc. (“Parklane”), against the two Petitioners and 12 other defendants.* The complaint alleged violations of §§ 10(b), 14(a) and 20(a) of the Securities Exchange Act of 1934 (the “1934 Act”), 15 U.S.C. §§ 78j(b), 78n(a) and 78t(a), certain rules thereunder and the common law.** Respondent demanded a trial by jury.

The action followed an October 1974 merger, pursuant to the laws of the State of New York, whereby Parklane was returned to its former status as a private company. The complaint, seeking damages, challenged the validity of

* The 14 defendants named in this action are listed in the caption of the opinion below. App. A, p. 1a.

** Federal jurisdiction in the court of first instance was based upon section 78aa of Title 15, United States Code, and principles of pendent jurisdiction. Section 78aa provides in pertinent part:

“The district courts of the United States, . . . , shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.”

the merger and alleged that the related proxy statement dated September 24, 1974 (the “Proxy Statement”) was deficient in a number of respects. The answers denied all of the material allegations of the complaint. The action was certified as a class action and the notice thereof informed the class that “[t]he complaint seeks money damages for the members of the class.”

While this action was still in its pre-trial stage, the SEC, on May 5, 1976, commenced an enforcement action in the United States District Court for the Southern District of New York against the two Petitioners (the “SEC action”). The SEC simultaneously moved, by order to show cause, for the same injunctive and ancillary relief sought in its complaint. The SEC did not challenge the validity of the Parklane merger. Rather, the SEC’s complaint and its motion were limited to a claim that the Proxy Statement was deficient in three respects.*

On May 20, 1976, Respondent moved to amend his complaint to include allegations of the same violations alleged in the SEC’s complaint and to add a claim for rescission. While Respondent’s motion to amend the complaint was pending, the trial of the SEC action was ordered to commence on June 2, 1976. The trial, to the Court alone, was concluded on June 7, 1976; decision was reserved.

* The SEC action was entitled *Securities and Exchange Commission v. Parklane Hosiery Co., Inc., Herbert N. Somekh*, 76 Civ. 2024 (KTD). The SEC’s complaint and motion were based upon § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); §§ 10(b), 13(a) and 14(a) of the 1934 Act, 15 U.S.C. §§ 78j(b), 78m(a) and 78n(a); and certain rules promulgated thereunder.

At the time the SEC action was commenced, the instant action was before District Judge Wyatt. The SEC action was assigned to District Judge Duffy. As the Court below was informed in response to its inquiry upon oral argument, Petitioners had applied in writing to Judge Duffy for reassignment of the SEC action to Judge Wyatt pursuant to the assignment rules of the District Court applicable to related cases. Petitioners’ application was denied.

At the time the SEC action was commenced and tried, this action was not ready for trial. Pre-trial discovery was far from complete. While there were then outstanding notices by both sides to take certain depositions, the only discovery in this action had been the production of certain documents by Parklane.

On September 3, 1976, subsequent to the conclusion of the trial of the SEC action, Respondent's motion to amend the complaint was granted. The amended complaint, served October 1, 1976, repeated Respondent's jury demand. The answers denied all of the material allegations of the amended complaint.

On November 9, 1976, the District Court (Duffy, J.) entered an Opinion and Order in the SEC action in which it found that the Proxy Statement violated § 14(a) of the 1934 Act and Rule 14a-9 thereunder in the three respects claimed by the SEC. *Securities and Exchange Commission v. Parklane Hosiery Co., Inc.*, 422 F. Supp. 477, *aff'd*, 558 F.2d 1083 (2d Cir. 1977).^{*} Thereupon, Respondent, on November 24, 1976, moved for partial summary judgment against Petitioners.

Respondent's motion was based upon a contention that Petitioners were collaterally estopped in this action by the findings of fact made in the SEC action. Petitioners, contending they were not so estopped, opposed the motion on the ground (a) that, in the SEC action, they had had no right to a jury trial; (b) that, in this action, they do have a right to the jury trial which Respondent himself had

^{*} The District Court denied all of the relief requested by the SEC except to the extent that Parklane was directed to file, and Petitioner Somekh, its president, to cause to be filed, amendments to Parklane's prior filings with the SEC to reflect the three deficiencies found in the Proxy Statement.

demand; and (c) that Respondent, who was not a party to the SEC action, could not, through collateral estoppel, deprive Petitioners of their jury trial right in this action.

The District Court (Wyatt, J.) denied Respondent's summary judgment motion, relying upon *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971), a case squarely in point. App. E, p. 26a. Respondent then moved, pursuant to 28 U.S.C. § 1292(b) and Rule 5, Fed.R.App.P., for certification of a question for appeal. The District Court granted the motion and the Court below granted the petition for leave to appeal.

The question certified was as follows:

"Whether the Court's findings of fact in a prior action commenced by the Securities and Exchange Commission ("SEC") can, by the doctrine of collateral estoppel, be applied to a subsequent action by a different plaintiff, seeking legal and equitable relief, based on the same transactions as was the action commenced by the SEC, when (a) there was no right to a jury trial in that action and (b) the Court found that the subject transaction was effected by means of materially misleading statements and omissions."

In its November 1, 1977 opinion, the Court below, deciding what it termed "the important question" raised upon the appeal (App. A, p. 2a), reversed the District Court. Expressly stating that it disagreed with the Fifth Circuit's decision in *Rachal, supra*, (App. A, p. 18a), the Court below held that Petitioners' jury trial right in this action as to issues of fact determined in the SEC action was extinguished, through collateral estoppel, on the ground that there had been a full and fair trial to the court alone in the SEC action.

The Court below also concluded that the jury trial right in this action as to those issues determined in the SEC action had been waived, though Respondent had not claimed, and the District Court had not found, any such waiver. The Court below stated that the jury trial right had been waived because Petitioners had not (a) sought to expedite the trial of this action or (b) requested the District Court to try the SEC action to a jury or before an advisory jury pursuant to Rule 39(b) or (c), Fed.R.Civ.P. App. A, p. 14a.

It is from the November 1, 1977 judgment and opinion of the Court below that Petitioners seek certiorari.

Reasons for Granting the Writ

I

The decision of the Court below is in direct conflict with the Fifth Circuit's decision in *Rachal v. Hill*, 435 F.2d 59 (1970), cert. denied, 403 U.S. 904 (1971), on the question whether the Seventh Amendment jury trial right may be extinguished, through collateral estoppel, where there is no mutuality of parties.

The decision below represents the first time a court has held that the right of trial by jury, as it existed in 1791 and was preserved by the Seventh Amendment, has been extinguished by a post-1791 change in the common law. The Court below held that Petitioners were collaterally estopped from trying to a jury in this action those issues which had been determined in the earlier-tried SEC action in which a jury trial right never existed and to which Respondent had not been a party. In so holding, the Court below relied upon the relatively recent relaxation of the requirement of mu-

tuality of estoppel* in cases where, unlike the case here, the right to a jury trial had not been in issue. App. A, p. 8a.

In thus denying Petitioners their jury trial right in this action, not only was the decision below admittedly in conflict with the Fifth Circuit's decision in *Rachal v. Hill*, *supra*, but it was also in conflict with the long-established principle, enunciated in *Dimick v. Schiedt*, 293 U.S. 474 (1935), that a post-1791 change in the common law cannot be invoked to extinguish the Seventh Amendment jury trial right as it existed in 1791.

The Fifth Circuit, in *Rachal*, in circumstances indistinguishable from those here, had held that defendants in a private action for damages under the federal securities laws could not be deprived of their jury trial right on the basis of findings made in an earlier-tried SEC enforcement action in which there had been no jury trial right and to which the plaintiff in the private action had not been a party. But for the decision below, *Rachal* has been consistently followed. *Securities and Exchange Commission v. Standard Life Corp.*, 413 F. Supp. 84 (W.D. Okla. 1976); *McCook v. Standard Oil Corp.*, 393 F. Supp. 256 (C.D. Cal. 1975); *Cannon v. Texas Gulf Sulphur Co.*, 323 F. Supp. 990 (S.D.N.Y. 1971). See also *Allegheny Airlines, Inc. v. United States*, 504 F.2d 104, 111 n.7 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975); *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.*, 453 F.2d 1177, 1184 (3d Cir. 1972); *Stewart v. United Australian Oil, Inc.*, [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,019 (S.D.N.Y. 1975).

* Mutuality of estoppel means that "unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as determinative of an issue in the second action." *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320-21 (1971).

A. The conflict between the Fifth and Second Circuits rests upon conflicting interpretations of this Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

The Second Circuit here, and the Fifth Circuit in *Rachal, supra*, arrived at their conflicting results on the basis of diametrically opposite interpretations of this Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). While the *Rachal* Court found *Beacon Theatres* to exemplify this Court's great respect for the Seventh Amendment jury trial right, 435 F.2d at 64, and upheld it against collateral estoppel, the Court below thought that *Beacon Theatres* evidenced this Court's "inherent respect for the doctrine of collateral estoppel" (App. A, p. 13a) and extinguished that right. However, *Beacon Theatres* and this Court's subsequent decision in *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160 (1963), *rev'g mem.*, 308 F.2d 875 (10th Cir. 1962), show that as between the constitutional jury trial right and the common law principle of collateral estoppel, the jury trial right is supreme.

In *Beacon Theatres, supra*, this Court held that, in a single action presenting claims for equitable and legal relief, mandamus should issue to compel a jury trial of the common issues. Since in *Beacon Theatres* there was mutuality, had the trial court, without a jury, first tried the common issues, trial of the legal claim to a jury might have been precluded. 359 U.S. at 503-04. To preserve the jury trial right against possible destruction by estoppel, this Court held that the common issues should be tried first, to a jury. *Accord, Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

Significantly, neither *Beacon Theatres* nor *Dairy Queen, supra*, reached the question whether the right to a jury trial of the common issues would in fact have been lost if

the equitable claims had first been tried to a court alone. That question was subsequently presented to this Court in *Meeker, supra*. The Court below, however, apparently without taking *Meeker* into account, assumed, on its reading of *Beacon Theatres*, that a prior trial of equitable claims would result in loss of the jury trial right of issues common to legal claims. App. A, pp. 10a-11a. *Meeker* disproves such an assumption and the interpretation given *Beacon Theatres* by the Court below.

In *Meeker*, plaintiffs asserted both legal and equitable claims, which presented common issues, and demanded a jury. The trial court, however, tried and determined the equitable claim - - and perforce the common issues - - adversely to plaintiffs. As a result, plaintiffs were precluded from relitigating those issues to a jury on the legal claim. Plaintiffs thereupon appealed, claiming that they had been denied their jury right. The Court of Appeals for the Tenth Circuit rejected plaintiffs' contention.* 308 F.2d at 884.

Though in *Meeker* plaintiffs had not sought mandamus to protect their jury trial right and there was no question that they had been accorded a full and fair trial by the court alone, this Court, on the basis of *Beacon Theatres* and *Dairy Queen*, reversed the Court of Appeals, and thereby preserved the jury trial right against destruction by estoppel. Plaintiffs were thereby afforded a retrial, to a jury, of the very same issues which a court had determined adversely to them.** The identical result was also reached by the Sixth Circuit in *National Union Electric Corp. v. Wilson*, 434 F.2d 986, 988 (1970).

* The facts in *Meeker, supra*, are discussed in the Court of Appeals decision, 308 F.2d 875; see 5 *Moore's Federal Practice* ¶ 38.11[8.-6] at 128.13 (2d ed. 1977).

** The fact of the retrial in *Meeker* appears in the District Court Docket, Civ. No. 8212 (W.D. Okla.), and the Judgment therein filed December 14, 1965.

Thus, contrary to the decision below, it is seen from *Mecker* that where, as here and in *Rachal*, there is a right to a jury trial, that right may not be denied either (a) because a party had been "accorded a full and fair opportunity to try those issues in the prior [non-jury] proceeding" (App. A, p. 7a) or (b) to serve considerations such as finality and judicial economy. App. A, pp. 13a-14a. As *Beacon Theatres*, *Dairy Queen*, and *Mecker* show, and as the Fifth Circuit, in *Rachal*, recognized, such considerations must bow to the preservation of the jury trial right.*

The validity of the Fifth Circuit's reading of *Beacon Theatres*, as contrasted with the Second Circuit's misapprehension of that case, may also be seen in *Beacon Theatres*' reference to *Dimick v. Schiedt*, *supra*, which had held that the jury trial right cannot be impaired by a post 1791 change in the common law. In *Beacon Theatres*, this Court granted certiorari when, as here, the jury trial right was threatened. Repeating what it had said in *Dimick*, this Court, in *Beacon Theatres*, wrote:

"We granted certiorari, 356 U.S. 956, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick v. Schiedt*, 293 U.S. 474, 486." 359 U.S. at 501.

* The suggestion of the Court below, that where there had been a full and fair non-jury determination of certain facts in a prior action there is no genuine issue as to those facts in a second action in which there is a jury trial right (App. A, p. 9a), begs the very question of the applicability of collateral estoppel. Thus, it is only where, unlike the case here, collateral estoppel can properly be invoked that findings in one action can be applied in a second action to render a factual issue undisputed.

B. While the application of collateral estoppel, in the absence of mutuality, may be discretionary in some circumstances, the Fifth and Second Circuits are in conflict as to whether a court's discretion may be exercised to destroy a Seventh Amendment jury trial right.

The Fifth Circuit in *Rachal*, *supra*, and the Second Circuit in this case recognized that the requirement of mutuality of estoppel has been relaxed. They are in conflict, however, as to whether, in the absence of mutuality, a constitutional jury trial right may be destroyed through collateral estoppel. The Court below believed that as long as there had been a full and fair trial to a court alone in an action in which the jury trial right never existed, a stranger to the action could invoke collateral estoppel to destroy the jury trial right in a second action. The Fifth Circuit, to the contrary, had held that in such circumstances collateral estoppel could not be invoked and that preservation of the jury trial right was required.

According to the Fifth Circuit, the mere fact that there had been a full and fair trial is not enough to permit the application of collateral estoppel in the absence of mutuality. The Fifth Circuit, unlike the Second Circuit, held that it was also necessary to consider whether the application of collateral estoppel would result in an injustice to the party against whom it is asserted. Thus, in *Rachal*, the Fifth Circuit wrote:

"While the requirement of mutuality need no longer be met, the doctrine of collateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and that application of the doctrine will not result in an injustice to the party against whom it is asserted under the particular circumstances of the case." 435 F.2d at 62. (citations omitted)

The standards for the application of collateral estoppel in the absence of mutuality so stated by the Fifth Circuit were confirmed by this Court in *Blonder-Tongue*, *supra*. While *Blonder-Tongue* represented the first time this Court permitted the application of collateral estoppel in the absence of mutuality, it also taught that, in the absence of mutuality, collateral estoppel depended upon considerations of "justice and equity" and could not be applied pursuant to an "automatic formula." 402 U.S. at 334. Though the Court below, in applying collateral estoppel to extinguish the jury trial right, indicated reliance upon *Blonder-Tongue* (App. A, p. 8a), it overlooked the significant fact that *Blonder-Tongue* had no occasion to consider whether, and did not suggest that, collateral estoppel would apply where, as here, a jury trial right was at stake.

Indeed, *Beacon Theatres* shows that where the exercise of discretion might affect the jury trial right, a court must, wherever possible, preserve that constitutional right. Referring to a court's discretion in setting the order of trial of legal and equitable claims, this Court, in *Beacon Theatres*, wrote:

"Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." 359 U.S. at 510. (footnote omitted)

That same principle was followed by the Fifth Circuit in *Rachal*, but disregarded by the Court below. The Fifth Circuit perceived the injustice of depriving the defendants in that case of the jury trial right they would have had, had the *Rachal* plaintiff been a party to the prior SEC enforcement action and had therein presented his claim for damages. The Court, in language apposite here, wrote:

"In light of the great respect afforded in *Beacon Theatres*, *supra*, and its progeny, for a litigant's

right to have legal claims tried first before a jury in an action where legal and equitable claims are joined, it would be anomalous to hold that the appellants have lost their right to a trial by jury on the issue of whether they are liable to respond in damages for violations of the security laws because of a prior adverse determination by the district court of the same issue in an action in which their present adversary was not a party and which arose in a different context from the present action. *Beacon Theatres*, *supra*, makes it clear that had Hill been a party plaintiff in the S.E.C. injunction action and there presented his claim for damages, the appellants would have received a jury trial on the issue of liability. It hardly makes sense that Hill can now assume a position superior to that to which he would have been entitled if he had been a party to the prior action. Accordingly, we hold that the application of the doctrine of collateral estoppel was not appropriate in view of the particular circumstances presented by this case and that the district court erred in granting summary judgment on the issue of liability." 435 F.2d at 64.*

Thus *Rachal*, rather than the conflicting decision of the Court below, is consistent with *Beacon Theatres*, *Dairy Queen*, *Meeker* and *Blonder-Tongue* which teach that, in the circumstances of this case, the jury trial right should be upheld and not destroyed by collateral estoppel.

* Similarly, in *McCook v. Standard Oil Co.*, *supra*, the Court balanced the policy favoring an end to litigation against preservation of the strong policy favoring the right to trial by jury and concluded, contrary to the decision below, that where, as here, a court is called upon to apply collateral estoppel in the absence of mutuality, a party should not be estopped where it had had no right to trial by jury in the first action. 393 F. Supp. at 258.

It is respectfully submitted that the conflict between the Second and Fifth Circuits and the uncertainty which that conflict has created as to the scope and importance of the Seventh Amendment jury trial right, justify the grant of certiorari and resolution of the conflict by this Court.

II

The Court below extinguished the jury trial right in derogation of the Seventh Amendment's preservation of that right as it existed in 1791 and contrary to this Court's interpretation of that Amendment.

In denying Petitioners their jury trial right in this action on the basis of non-jury findings made in an SEC enforcement action in which the jury trial right never existed and to which Respondent was a stranger, the Court below reached a result which cannot be reconciled with the Seventh Amendment and this Court's interpretation of it.

While the Court below recognized that, in determining whether a jury trial right exists, it is necessary to ascertain whether such a right existed in 1791 when the Seventh Amendment was adopted, the Court below found that it could not successfully make such an historical inquiry. Thus, the Court below stated that, in respect of actions for damages under the federal securities laws, it could not "by reference to 1791 precedents, determine what jury trial and collateral estoppel rules would have been developed or applied by common law courts of that period." App. A, p. 17a.

To the contrary, a determination can be made as to the jury trial and collateral estoppel rules applicable in the circumstances here. The decisions of this Court demonstrate:

(a) that it is "'a matter too obvious to be doubted'" that a Seventh Amendment jury trial

right does exist in respect of claims for damages brought under post-1791 statutes, *Curtis v. Loether*, 415 U.S. 189, 193 (1974); see *Schine v. Schine*, [1969-70 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,552 (S.D.N.Y. 1970); *Richland v. Crandall*, 259 F. Supp. 274 (S.D.N.Y. 1966);

(b) that "[i]n order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791," *Dimick v. Schiedt*, *supra*, 293 U.S. at 476; see *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935);

(c) that, in 1791, where, as here, there was no mutuality, collateral estoppel could not have been invoked, *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912); *Brooklyn City and Newtown R.R. Co. v. National Bank of the Republic of N.Y.*, 102 U.S. 14 (1880); see *Mutual Benefit Life Insurance Co. v. Tisdale*, 91 U.S. 238 (1876); *Barr v. Gratz's Heirs*, 17 U.S. 213 (1819), and, hence, could not - - as was done here - - have extinguished a jury trial right; and

(d) that the jury trial right may not be extinguished by a post-1791 change in the common law doctrine of collateral estoppel. See *Dimick v. Schiedt*, *supra*.

In light of these established principles, it is apparent that the Court below had no basis for applying collateral estoppel to extinguish Petitioners' jury trial right. While the Court below noted that the 1791 law courts "respect[ed] decrees and findings in equity" (App. A, p. 18a), it overlooked the fact, relevant here, that, in the absence of

mutuality, those courts refused to give such decrees and findings any estoppel effect. More importantly, the Court below acknowledged the "absence of any 1791 authority for extension of the equitable doctrine of collateral estoppel to the present case." App. A, p. 18a.

Nor was there any basis for speculating -- as the Court below did (App. A, p. 17a) -- that the 1791 courts might "perhaps" have created an exception to the mutuality requirement simply because it was the government, here the SEC, which had obtained a prior judgment. No such exception was created by the 1791 courts. See *Mutual Benefit Life Insurance Co. v. Tisdale*, *supra*.

In *Mutual Benefit*, *supra*, this Court illustrated the principle that a 1791 private litigant, who was a stranger to an earlier-tried action brought by the government, could not invoke the findings made in that action through estoppel in a private action. As this Court wrote:

"If an indictment for an assault and battery by A upon B is prosecuted to a trial and conviction, the record is conclusive evidence in favor of A upon a subsequent indictment for the same offense; but, if B sues A for the same assault and battery, it cannot be doubted that it would be incompetent to introduce that record as evidence of the offense. For this purpose, it is inter alios acta. B was no party to that proceeding. In theory of law he was not responsible for it, nor capable of being benefited by it." 91 U.S. at 244.

Moreover, in the very article relied upon by the Court below (App. A, p. 18a), the authors, referring to the state of the law in 1791 in relation to *Rachal v. Hill*, *supra*, wrote:

"[L]imitations on the doctrine of collateral estoppel—in particular the doctrine of mutuality—would

have made it impossible for [plaintiff] to deprive [defendants] of a jury on the issue of liability in an analogous proceeding in 1791 . . ." Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 Harv.L.Rev. 442, 454 (1971).

The fact, noted by the Court below, that relatively recently the common law requirement of mutuality of estoppel has been relaxed in some cases (App. A, p. 8a), cannot affect, let alone extinguish, Petitioners' right to a jury trial here. See *Dimick v. Schiedt*, *supra*. None of those cases involved a question of the jury trial right. In no instance had the jury trial right been denied through any relaxation of the mutuality requirement.*

Indeed, this Court, contrary to the unprecedented result reached by the Court below, has made it crystal clear that the constitutionally preserved right to a jury trial is supreme and cannot be lost through a post-1791 change in a common law doctrine. Thus, in *Dimick*, *supra*, this Court wrote:

"It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying

* Collateral estoppel could be applied as to a legal issue in the absence of mutuality only where, unlike the case here, the constitutional right to trial by jury has been satisfied by an opportunity to try that issue to a jury in a prior action. See e.g., *United States v. United Air Lines, Inc.*, 216 F. Supp. 709, 729 (E.D. Wash. 1962), *aff'd in part, modified in part on other grounds sub nom. United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 404 (9th Cir. 1964).

conditions. *Funk v. United States*, 290 U.S. 371. But here we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution." 293 U.S. at 487.

In denying Petitioners the benefit of the constitutional principles enunciated in *Dimick*, the Court below relied upon a demonstrably irrelevant difference between the claim asserted in *Dimick* - a personal injury case - and the claim here. App. A, pp. 16a-17a. However, since here, as in *Dimick*, the constitutional jury trial right exists, the fact that the claims asserted were different cannot impair the applicability in each case of the constitutional principles enunciated in *Dimick*.

Apparently misapprehending *Dimick* and subsequent decisions of this Court which also have held that the Seventh Amendment jury trial right, as it existed in 1791, "shall be preserved," e.g., *Curtis v. Loether, supra*, the Court below apparently thought that *Ross v. Bernhard*, 396 U.S. 531 (1970), "somewhat weakened" that requirement and could justify its unprecedented denial of the jury trial right as it existed in 1791. App. A, pp. 15a-16a.

It is respectfully submitted, however, that *Ross, supra*, did not in any respect "weaken" the requirement of the historical inquiry. Rather, *Ross* simply stated that the historical inquiry happened to be the "most difficult" to apply among three factors bearing upon the question whether a particular issue was "'legal'" in nature. As this Court, in *Ross*, wrote:

"Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply." 396 U.S. at 538 n.10.

It is one thing to say, as in *Ross*, that the "required" historical inquiry is difficult; it is an entirely different matter to say, as the Court below did, that because a principle is difficult to apply the principle has been "weakened". *Ross* simply stands for the proposition that an enlargement of the jury trial right beyond its 1791 boundaries is consistent with the Seventh Amendment.*

By its reliance upon *Bloom v. Illinois*, 391 U.S. 194 (1968) (App. A, p. 16a), the Court below further evidenced its misunderstanding of the principle that the jury trial right, as it existed in 1791, may not be curtailed. In *Bloom*, which involved a Sixth Amendment jury trial right, this Court enlarged that right to afford it in actions in which it had not existed in 1791. Indeed, in the very passage from *Bloom* quoted below (App. A, p. 16a), this Court contrasted *Thompson v. Utah*, 170 U.S. 343 (1898), where, upon an historical analysis, an attempted curtailment of the 1791 jury trial right was held to be impermissible. 391 U.S. at 200 n.2.

It is respectfully submitted that the unprecedented curtailment of the jury trial right by the Court below constitutes a violation of the Seventh Amendment mandate that the jury trial right "shall be preserved." *Dimick v. Schiedt, supra*. The significance of the error of the Court below is not confined to this case alone. In view of the conflict between the Second and Fifth Circuits, the right to trial by jury has become uncertain in every instance in which the SEC may institute enforcement actions raising the same

* In enlarging the jury trial right, this Court, in *Ross*, held there was a jury trial right in a stockholders' derivative suit for damages, though such actions were traditionally cognizable only in equity and, consequently, had not been triable to a jury as of right.

issues as are raised in related private litigation. *Securities and Exchange Commission v. Wills*, [Current Transfer Binder] CCH Fed. Sec. L. Rep. ¶96,321 (D.D.C. 1978); see also *Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc.*, No. 76-6175 (2d Cir. March 3, 1978).

III

The Court below established an unprecedented and demonstrably untenable rule in holding that the constitutional jury trial right in a private action for damages is waived if such action cannot be expedited and tried prior to the trial of a related SEC enforcement action.

Notwithstanding the fact (a) that a right to trial by jury did not exist in the SEC enforcement action and (b) that, at the time the trial of that action was ordered, this action was not ready for trial, the Court below concluded that the Seventh Amendment jury trial right in this action had been waived. App. A, pp. 14a, 18a-19a. Respondent certainly did not claim, and the District Court did not find, any such waiver. That question was first raised by the Court below, which did so on demonstrably untenable grounds.

Thus, the Court below ruled that Petitioners -- who were the only defendants in the SEC action but are only two of the 14 defendants named in this action -- should have "sought to expedite trial of the present action" to preserve their jury trial right. App. A, p. 14a. However, the trial of this action could not have been expedited to avoid a prior non-jury determination of the common issues. The ruling not only was wholly unrealistic in light of the procedural posture of each of the cases, but also does vio-

lence to the well-established policy requiring SEC enforcement actions to be tried without being delayed by private litigation.

The SEC action was commenced on May 5, 1976 and the trial thereof was ordered to commence on June 2, 1976. At that time, pre-trial discovery in this action was far from complete. There would have been no way, in the four weeks between the commencement and the trial of the SEC action, for the parties to this action to have prepared for, and proceeded to, trial. This is to say nothing of the fact that Respondent's May 20, 1976 motion to amend his complaint in this action was not decided until September 3, 1976, months after the trial in the SEC action had been concluded.

Nor could Petitioners have stayed the trial of the SEC action until after this action was made ready for trial and tried. *Securities and Exchange Commission v. Wills, supra*; see *Securities and Exchange Commission v. Everest Management Corp.*, 475 F.2d 1236 (2d Cir. 1972); *Securities and Exchange Commission v. General Host Corp.*, 60 F.R.D. 640 (S.D.N.Y. 1973), *aff'd*, 508 F.2d 1332 (2d Cir. 1975); *Securities and Exchange Commission v. National Student Marketing Corp.*, 59 F.R.D. 305 (D.D.C. 1973).

In *Wills, supra*, defendants, relying upon the decision below, sought to preserve their jury trial right in certain private actions by moving for a stay of the trial of a related SEC enforcement action until after the trials of the private actions. In *Wills*, as was the case here, the private actions were not ready for trial at the time the SEC action was ordered to trial. The Court, finding that Congress had

intended that SEC actions should proceed unobstructed by private litigation, denied the motion. The Court wrote:

"The SEC is charged with statutory responsibility to vindicate the public interest. It perceives the threat of future violations and moves to prevent them. Congress was at pains to make it abundantly clear that the Commission in such circumstances should proceed unobstructed by private litigation. See, e.g., S. Rep. No. 94-75, 94th Cong., 1st Sess. 76-77 (1975). The Commission is ready, discovery is completed, a trial date is set, and the case will proceed with trial to the Court." [Current Transfer Binder] CCH Fed. Sec. L. Rep. at p. 93,072.

In *Everest Management, supra*, the Second Circuit also refused to delay an SEC enforcement action even to permit intervention by parties claiming to have been defrauded in the very transaction complained of by the SEC. There, Judge Timbers, a member of the Panel below, wrote:

"Appellants argue, accordingly, [on the basis of *Rachal v. Hill, supra*] that, unless intervention in the present SEC action is permitted, a total relitigation of the issues would be required in a subsequent action.

"Suffice it to say that in our view it is preferable to require private parties to commence their own actions than to have SEC actions bogged down through intervention." 475 F.2d at 1240 n.5.

The same policy was sounded in *General Host, supra*, where the Court stated:

"As a matter of general policy, it is undesirable that SEC actions for injunctive relief, whose sole

purpose is the expeditious safeguarding of the public interest, be subjected to the delays that are inherent in private litigations, with their different concerns, even where those private actions parallel the SEC complaints.' " 60 F.R.D. at 641-42.

It is thus apparent that there was no merit whatsoever to the unprecedented and untenable rule established by the Court below that to avoid waiver of the jury trial right in a private action, such action must be expedited and tried prior to the trial of a related SEC action.

IV

The Court below established an unprecedented and futile requirement that to avoid waiver of the jury trial right in a private action for damages it is necessary to request a jury in a related SEC enforcement action in which there is no jury trial right.

The Court below also ruled that to avoid waiver of their jury trial right in this action Petitioners should have requested Judge Duffy, who tried the SEC enforcement action, to exercise his discretion, pursuant to Rule 39(b), Fed.R.Civ.P., to order the issues in that action tried to a jury. App. A, p. 14a. Such a suggestion is demonstrably untenable. The futility of the suggestion is underscored by *Wills, supra*, and *Commonwealth Chemical, supra*, which held such a request to be groundless.

A jury trial under Rule 39(b) could not have been properly demanded in the SEC enforcement action. Rule 39(b) is expressly limited to "an action in which such a [jury] demand might have been made of right", and there certainly was no such right in the SEC enforcement action. *Securities and Exchange Commission v. Commonwealth Chem-*

ical Securities, Inc., supra; Securities and Exchange Commission v. Wills, supra; Securities and Exchange Commission v. Associated Minerals, Inc., 75 F.R.D. 724 (E.D. Mich. 1977); *Securities and Exchange Commission v. Petrofunds, Inc.*, 420 F. Supp. 958 (S.D.N.Y. 1976). A jury demand under Rule 39(b), suggested by the Court below, would have been improper.

The confusion which the decision below has engendered may also be seen in the fact that while the decision below suggested that a jury demand should have been made in the SEC enforcement action, subsequently the Second Circuit, in *Commonwealth Chemical*, held that a jury trial right did not exist in such an action.

V

The Court below ruled erroneously that the use of an advisory jury could satisfy a Seventh Amendment jury trial right.

The further ruling of the Court below that to avoid waiver of their jury trial right in this action Petitioners should have requested an advisory jury in the SEC action, pursuant to Rule 39(e), Fed.R.Civ.P., (App. A, p. 14a) was also erroneous. An advisory jury could have had no bearing whatsoever upon Petitioners' Seventh Amendment jury trial right. *Securities and Exchange Commission v. Wills, supra*. "By its nature, the function of the advisory jury is to enlighten the conscience of the trial court and the jury's verdict has no binding effect upon that court." 5 *Moore's Federal Practice* ¶ 39.10[3] (2d ed. 1977); *Mallory v. Citizens Utilities Company*, 342 F.2d 796 (2d Cir. 1965); *(American) Lumbermens Mutual Casualty Co. of Illinois v. Timms & Howard, Inc.*, 108 F.2d 497 (2d Cir. 1939).

In *Wills*, the Court, addressing the same suggestion made by the Court below regarding the use of an advisory jury, wrote:

"The suggestion that an advisory jury might be used is, on analysis, misplaced. Defendants want to protect a perceived constitutional right to jury trial, but an advisory jury does not satisfy this right." [Current Transfer Binder] CCH Fed. Sec. L. Rep. at pp. 93,072-73.

Moreover, even where an advisory jury is used, the facts are to be found by the court, Rule 52(a), Fed.R.Civ.P., and the "review on appeal is from the court's judgment as though no jury had been present." *(American) Lumbermens Mutual Casualty Co. of Illinois v. Timms & Howard, Inc., supra*, 108 F.2d at 500.

It is respectfully submitted that, contrary to the ruling of the Court below, to substitute for a jury, which a party has as of constitutional right, an advisory jury, whose fact-finding is neither binding nor subject to review, would render the constitutional right illusory. Clearly, there could be no waiver of a Seventh Amendment jury trial right merely because a request is not made for an advisory jury.*

* While the Court below relied on *Goldman, Sachs & Co. v. Edelstein*, 494 F.2d 76 (2d Cir. 1974), that case cannot support the conclusion of the Court below that trial of the SEC enforcement action, without objection by Petitioners, resulted "in the destruction by collateral estoppel of the defendants' right to a jury trial of the same issues". App. A, p. 19a. To the contrary, as has been seen, there were no valid grounds upon which to object to the trial of the SEC action, and, as seen in *Wills, supra*, any objection would have been fruitless. *Goldman, Sachs* in no respect has any relevance to the circumstances here. Unlike the SEC action here, in which the jury trial right had never existed, *Goldman, Sachs* involved waiver of a jury trial in a private action where such right had existed.

VI

The decision below raises significant and recurring problems regarding conflicting considerations of the efficient adjudication of SEC enforcement actions and the preservation of the jury trial right in related private actions.

The effect of the decision below is to place a defendant, which is party to both an SEC enforcement action and a related private action, in an untenable position if, as is the case here, the defendant wishes to preserve its constitutional jury trial right in the private action. Brodsky, *The Frustration of Private Counsel: Uncertainties Favor The Commission*, 178(116) N.Y.L.J. (12-19-77) p. 48; Mathews and Thompson, *SEC Enforcement Program: Emphasis on Perquisites Highlights Year's Actions*, 178(116) N.Y.L.J. (12-19-77) pp. 45-46. While this problem arises here in the context of SEC enforcement actions, it would also arise in analagous situations involving other agencies of the government.

As has been seen, in keeping with the purpose of an SEC enforcement action to safeguard the public interest, delay is not to be countenanced. *E.g.*, *Securities and Exchange Commission v. Wills*, *supra*. Thus, a defendant in an SEC action cannot stay that action to enable a related private action to be tried first.* Accordingly, the defendant faced with an SEC action and a related private action is left with two choices, each of which would create an obvious injustice in view of the constitutional right at stake.

* The apparent effect of the suggestion of the Court below that this action should have been expedited for trial prior to the trial of the SEC action is in conflict with the policy to have SEC enforcement actions proceed unobstructed by related private litigation. Thus, in the circumstances here, the only way to have tried the private action prior to the SEC action would have been through a stay of the SEC action -- but, as seen in *Wills*, such a stay would not be available.

The first choice is to contest the SEC action. However, by doing so, according to the Court below, the defendant exposes itself to the risk of an adverse determination which would extinguish its constitutional jury trial right in the private action.

The other choice is to settle the SEC action to avoid a trial and thereby prevent the possibility of an adverse determination. However, to force a defendant to settle one action, in which it has no jury trial right, in order to preserve its constitutional jury trial right in a second action, would be inconsistent with the Seventh Amendment's preservation of that right. Moreover, to place a defendant in such a position is to give the SEC, at a time when its allegations are as yet unproven, unfair and unwarranted leverage in dictating settlement terms to a defendant intent on preserving its jury trial right.

In this regard, the Brodsky article, *supra*, after discussing various areas of uncertainty in SEC litigation, stated:

"Thus, in SEC injunction actions the Commission is now armed with an additional argument in its powerful array of arguments to persuade targets of investigations to settle with them—namely, that even if no injunction is mandated, the court may issue findings and direct that public disclosure material be corrected. If it does, those findings will be binding, at least in the Second Circuit, in a private action for damages." Brodsky, *supra*, 178(116) N.Y.L.J. (12-19-77) at p. 48, col. 5.

Similarly, the Mathews and Thompson article, *supra*, observed:

"*Shore* on its face is a great boon for class action plaintiffs—at least those who are able to bring their cases in the Second Circuit. The decision may also benefit the SEC's enforcement program. Po-

tential SEC defendants are less likely to resist settlement and to force the SEC to trial knowing that the strike suitors waiting in the wings will be able to ride the coattails of the SEC's substantial trial preparation and presentation efforts." Mathews and Thompson, *supra*, 178(116) N.Y.L.J. (12-19-77) at p. 46, col. 1.

In sum, the decision below places defendants in private actions under the federal securities laws in the Second Circuit, unlike defendants in such actions in the Fifth Circuit, in a position which either does violence to their Seventh Amendment jury trial right or may force them to refrain from contesting allegations they deny in related SEC enforcement actions.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that certiorari should be granted.

Respectfully submitted,

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 49—September Term, 1977.

(Argued September 12, 1977 Decided November 1, 1977.)

Docket No. 77-7163

LEO M. SHORE,

Plaintiff-Appellant,

—against—

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH,
DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of
trusts for the benefit of his children, CHARLES B. YAFFE,
BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL
APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR
GOLD, STANLEY KUSCHNER and HAROLD STONE,
Defendants,

PARKLANE HOSIERY COMPANY, INC., and
HERBERT N. SOMEKH,

Defendants-Appellees.

Before:

MANSFIELD and TIMBERS, *Circuit Judges,*
and DOOLING, *District Judge.**

* Of the United States District Court for the Eastern District of New York, sitting by designation.

Interlocutory appeal by plaintiff pursuant to 28 U.S.C. §1292(b) from an order of the Southern District of New York, Inzer B. Wyatt, *Judge*, in a stockholders' class action for damages against corporate officers and directors alleging issuance of false proxy statement in violation of §14(a) of the Securities Exchange Act of 1934, which denied plaintiff's motion for summary judgment against two defendants (Parklane Hosiery Company, Inc. and Herbert N. Somekh) based on the ground that they were collaterally estopped from denying adverse findings made by the district court in a prior action against them that had been affirmed on appeal, see *SEC v. Parklane Hosiery Co., Inc. and Herbert N. Somekh*, 422 F. Supp. 477 (S.D.N.Y.), *aff'd.*, 558 F.2d 1083 (2d Cir. 1977).

Reversed.

SAMUEL K. ROSEN, Esq., New York, N.Y. (Stuart D. Wechsler, Esq., Patricia I. Avery, Attorney, Kass, Goodkind, Wechsler & Gerstein, New York, N.Y., of counsel), *for Plaintiff-Appellant*.

IRVING PARKER, Esq., New York, N.Y. (Joseph N. Salomon, Esq., Norman Trabulus, Esq., Jacobs Persinger & Parker, New York, N.Y., of counsel), *for Defendants-Appellees*.

MANSFIELD, *Circuit Judge*:

This appeal raises the important question of whether a party who has had issues of fact determined against it after a full and fair opportunity to litigate them in a non-jury trial of an action against it may, in a different suit against it by another person, obtain a jury trial of the

same issues of fact arising out of the same transaction. We hold that it is collaterally estopped from doing so.

In November 1974 the present class action was commenced on behalf of stockholders of Parklane Hosiery Company, Inc. ("Parklane") against Parklane and 12 of its officers, directors and stockholders, alleging that a proxy statement issued by them on September 24, 1974, contained materially false and misleading statements in violation of §§10(b), 13(a), 14(a) and 20(a) of the Securities Exchange Act of 1934 as amended, and rules and regulations promulgated thereunder. Parklane had been a publicly-held company engaged in the retail sale of women's apparel, 71.68% of whose outstanding shares were controlled by the defendants. In furtherance of a proposed merger whose purpose was to convert Parklane into a privately-owned company controlled entirely by defendants, they caused a proxy statement to be sent to Parklane's stockholders in September advising that on October 14, 1974, there would be a meeting to consider the proposal. Following the meeting the plan was consummated. Parklane merged with New PLHC Corp., a private company controlled by defendants, and each of the minority stockholders, including plaintiff, was paid \$2 per share for his holdings, subject to the right of any dissenting stockholder to obtain an appraisal pursuant to the New York Business Corporation Law.

The Amended Complaint alleges that the proxy statement

(1) failed to disclose that the purpose of the merger was to help defendant Herbert N. Somekh, Parklane's president, to meet his personal obligations rather than to further any valid corporate objective;

(2) failed, in referring to Parklane's termination of negotiations with respect to its lease of certain property from the Federal Reserve Board of New York,

to reveal that continuation of the negotiations could result in substantial financial benefits to Parklane; and

(3) failed to disclose, in advising that two appraisers had been employed by Parklane to determine the fair value of its stock, that the appraisers had not been furnished with sufficient information to prepare a true and complete valuation.

It further alleges that the distribution of the proxy statement was part of a fraudulent scheme giving rise to liability to the plaintiff and other members of the class pursuant to Rule 10b-5 of the Securities Exchange Act of 1934. The complaint seeks damages, a rescission of the merger, costs and such other relief as might be granted by the court.

In May 1976, about a year and a half after commencement of the present action, the Securities and Exchange Commission ("SEC") brought suit in the Southern District of New York against Parklane and Somekh, alleging that their issuance of the September, 1974, proxy statement violated §17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a), and §§10(b), 13(a), and 14(a) of the Securities and Exchange Act of 1934, 15 U.S.C. §§78j(b), 78m(a) and 78n(a), and rules promulgated thereunder. The SEC charged that the proxy statement was materially false and misleading in essentially the same respects as those that had been alleged by the plaintiff in this action. The SEC sought equitable relief, including the appointment of a special counsel to determine the fair value of the Parklane shares held by the minority stockholders eliminated by the merger and an injunction against further violations by the defendants of the antifraud, proxy and reporting provisions of the federal securities laws. After a trial in which the SEC's application for preliminary injunctive relief was consolidated with trial of the action

on the merits pursuant to Rule 65(a), F.R.Civ.P., and both Parklane and Somekh were accorded a full and fair opportunity to adduce evidence and cross-examine witnesses produced by the SEC, Judge Kevin T. Duffy of the Southern District of New York on November 9, 1976, filed a 26-page opinion which constituted his findings of fact, conclusions of law and final order in the case.

In his decision Judge Duffy, after noting the pendency of the present action and analyzing the evidence before him, found (1) that the September 24, 1974, proxy statement failed to disclose that the "overriding purpose for the merger was to enable Somekh to repay his personal indebtedness," (2) that the proxy statement was also false in stating that there were "no negotiations at present" with the Federal Reserve Board of New York with respect to cancellation of Parklane's lease of property from the Board when in fact negotiations were continuing in early October 1974 and the Federal Reserve Board's representative had agreed to recommend payment of \$1,200,000 to compensate for the loss caused by the cancellation, of which \$300,000 would be payable to Parklane as its share, and (3) that the proxy statement was misleading in that it failed to disclose that the appraisers, Thomson & McKinnon, Auchincloss & Kohlmeyer, Inc., had not been informed of certain facts pertinent to their evaluation of Parklane shares, including Somekh's plans to use \$1 million of corporate assets to reduce his personal indebtedness, his intentions to sell certain real property to Parklane and of the negotiations with the Federal Reserve Board with respect to cancellation of the leasehold. Judge Duffy further found, on the basis of his detailed discussion of the evidence before him, that each of these three false statements or non-disclosures was material under the standard established by the Supreme Court in *TSC Industries, Inc. v. Northway*, 426 U.S. 438 (1976). See also *SEC v. Texas*

Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).

Although the district court concluded in the SEC case that the defendants had violated §14(a) of the Exchange Act of 1934, it decided that the requested relief—an injunction and appointment of a special counsel to determine the fair value of the Parklane shares—would not be appropriate and limited relief to a direction that Parklane amend its prior filings with the SEC to correct the misstatements and non-disclosures and file a Form 10K for 1975, if one had not been filed. Judge Duffy's decision was affirmed by us on July 8, 1977, see 558 F.2d 1083, in an opinion specifically upholding each of his findings and his determination that each of the misstatements or omissions was material.

On the basis of the district court's November 9, 1976, decision plaintiff in the present action moved on November 24, 1976, for summary judgment against Parklane and Somekh, contending that by reason of Judge Duffy's detailed findings of fact, those two defendants were collaterally estopped from asserting that any genuine issues of material fact regarding liability remained for trial. The motion was denied by Judge Inzer B. Wyatt in a cryptic opinion as follows: "The within motion is denied. *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970). So ordered."

In *Rachal* the Fifth Circuit was faced with the question before us—whether corporate officers who have had issues of fact determined against them in a non-jury trial of an SEC suit for injunctive relief are collaterally estopped from relitigating those issues before a jury in a subsequent class and derivative action for damages brought by stockholders. The court, conceding that mutuality of parties was no longer a prerequisite for collateral estoppel, nevertheless held that the Seventh Amendment right to a jury trial of contested issues of fact survived any prior non-

jury adjudication, relying principally on the Supreme Court's decision in *Beacon Theatres Inc. v. Westover*, 359 U.S. 500 (1959).

Following his decision Judge Wyatt certified his order pursuant to 28 U.S.C. §1292(b). Since it involved a controlling question, we permitted an interlocutory appeal in the interests of avoiding a wasteful and unnecessary trial, see F.R.A.P. 5(a). We reverse.

Discussion

Absent a demand for a jury trial in the present action, it is clear that Parklane and Somekh would be collaterally estopped from relitigating the issues resolved against them in *SEC v. Parklane Hosiery Co., Inc. and Herbert N. Somekh*, 422 F. Supp. 477 (S.D.N.Y. 1976), *affd.*, 558 F.2d 1083 (2d Cir. 1977). The issues in both proceedings are identical, and the defendants were accorded a full and fair opportunity to try those issues in the prior proceeding.

That the prior proceeding was equitable in nature has never been considered a ground for denying collateral estoppel or res judicata effect in a court of law to the findings or judgment of a court of equity, even before merger of the law and equity systems, *Katchen v. Landy*, 382 U.S. 323, 337-38 (1966); *Brady v. Daly*, 175 U.S. 146, 159 (1899); *Smith v. Kernochen*, 48 U.S. (7 How.) 198 (1849); *Crane Co. v. American Standard, Inc.*, 490 F.2d 332, 343 (2d Cir. 1973); see Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases, A Comment on Rachal v. Hill*, 85 Harv. L. Rev. 442, 450-54 (1971); Restatement of Judgments §68, Comment j (1942). Although the plaintiffs in the two proceedings differ and mutuality of parties was at one time a prerequisite for application of the doctrine of collateral estoppel, see *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912),

this court in *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir. 1964), following the lead of Justice Traynor in *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942), dispensed with mutuality as a requirement, taking the view that a requirement of complete identity of parties serves no purpose as long as the person against whom the findings are asserted or his privy has had a full and fair opportunity to litigate the identical issue in the prior action. Any lingering doubt in the matter was eliminated by the Supreme Court's decision in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), where the Court, citing *Zdanok* and *Bernhard* with approval, unanimously concluded that a determination of patent invalidity against a party in prior litigation was binding against it in a subsequent suit to enforce the patent against others.¹

Turning to the question of whether, notwithstanding the doctrine of collateral estoppel, the defendants are entitled to relitigate the same issues of fact before a jury, it must be recognized that the Seventh Amendment² does not create new jury trial rights. It simply preserves the right to a

¹ Prior to *Blonder-Tongue*, the Supreme Court in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), had held that when an administrative agency acts in a judicial capacity, collateral estoppel effect may be given to its findings of fact against the respondent rather than require relitigation in subsequent legal proceedings, 384 U.S. at 421-22. This principle has since been applied to give such effect to agency determinations in later private damage suits against the respondent. See *H.L. Robertson & Assoc. Inc. v. Plumbers Local No. 519*, 429 F.2d 520, 521 (5th Cir. 1970); Comment, Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel and Jury Trial, 43 U. Chi. L. Rev. 338, 356 (1976).

² The Seventh Amendment provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

jury trial as it existed in 1971, 5 Moore, Federal Practice ¶38.05[5], at 82-83 (2d ed. 1974). Moreover, the right to a jury trial exists only in "suits at common law" rather than those in equity, see *Ross v. Bernhard*, 396 U.S. 531 (1970), and only with respect to disputed issues of fact. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-20 (1902). Where no genuine issue of material fact exists, the court may, without violating Seventh Amendment rights, grant summary judgment pursuant to Rule 56, F.R.Civ.P. E.g., *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 (9th Cir. 1974); *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957). Similarly the court may, consistently with the Seventh Amendment, withdraw a case from the jury and order the entry of a directed verdict where the evidence, viewed most favorably to the party against whom the judgment is entered, would not be sufficient to support a verdict in that party's favor. Rule 50, F.R.Civ.P.; *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935). Failure to make a prompt demand for a jury constitutes a waiver of the right to one. Rule 38(d), F.R.Civ.P.

Since the Seventh Amendment preserves the right to a jury trial only with respect to issues of fact, once those issues have been fully and fairly adjudicated in a prior proceeding, nothing remains for trial, either with or without a jury. The party seeking the retrial has already exercised his right to be heard on the issues and to cross-examine witnesses with respect to them. The interests of finality, certainty and economy of judicial resources then come into play to preclude his relitigating the same issue a second or third time, with the possibility of inconsistent findings, absent some showing of fundamental unfairness in the prior proceeding or some unusual circumstances such as fraud that would render inappropriate the application of the doctrine of collateral estoppel. See *Commissioner*

v. *Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sacramento*, 94 U.S. 351 (1876).

Apparently accepting these fundamental principles, appellees rely, as did the district court, on the Fifth Circuit's decision in *Rachal v. Hill*, *supra*, for the proposition that they are nevertheless entitled to a second trial of issues once determined, this time before a jury. In reaching that conclusion the court in *Rachal* rested its decision almost entirely upon its interpretation of *Beacon Theatres v. Westover*, 359 U.S. 500 (1959). That case, however, did not deal with the question of whether a party has a right under the Seventh Amendment to a jury retrial of issues already adjudicated in a non-jury proceeding, but with the scope of a judge's discretion in determining the order or sequence in which legal and equitable claims joined in the same action under the liberal federal rules, which merge law and equity, see Rule 18, F.R.Civ.P., and mandate the assertion of compulsory counterclaims, see Rule 13, F.R.Civ.P., must be tried. Plaintiff in *Beacon Theatres* brought an action seeking a declaratory judgment and injunctive relief against the institution of a treble damage antitrust suit, to which the defendant responded by interposing a compulsory counterclaim for treble damages raising the same issues and demanding a jury. Were the equitable claims tried first to the court, the defendant would have been precluded under the doctrine of collateral estoppel from relitigating issues common to the two claims in a trial before a jury to which the defendant was entitled under the Seventh Amendment. Recognizing this alternative, the Supreme Court held that it was an abuse of discretion for the district court to schedule the equity claims first for trial.

The Court in *Beacon Theatres* was not required to face the question of whether, once there has been a prior non-jury trial of the issues without objection in an independent

equity proceeding, as was the case here, the losing party may then demand a jury retrial of the same issues. However, as we noted in *Crane Co. v. American Standard, Inc.*, 490 F.2d 332, 342 (1973), the Supreme Court's concern over which of the claims should first be tried, rather than evidencing support for such procedure, was based on the assumption that unless the jury trial was held first the findings in the non-jury proceeding would be conclusive. Indeed, even with respect to the order of presentation of legal and equitable claims, Justice Black indicated in *Beacon Theatres* that there might be some exceptional instances where a court, in the exercise of its discretion, would be justified in permitting the issues to be resolved first in the equity proceeding even though this could result in precluding a jury trial, stating:

"If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." 359 U.S. at 510 (footnote omitted).

Thus *Beacon Theatres* simply asserts that where parties join legal and equitable claims arising out of the same transaction, the court must schedule the sequence of trials to protect a party's constitutional right to a jury trial.³

³ Three years later the Court extended the principles of *Beacon Theatres* to hold in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), that where

However, we do not view the decision as compelling the result reached in *Rachal*. If anything, *Beacon Theatres* implicitly confirms the long-accepted principle that a non-jury adjudication of issues asserted in an equitable claim will collaterally estop a later jury trial of the same issues presented by the same party in a legal claim. Had it not been for that basic assumption the Supreme Court would not have been concerned about the order in which the legal and equitable claims were to be tried, since the defendant would then have been guaranteed a jury trial of the counterclaim regardless of the outcome of the equitable claim. As Justice Black noted in his majority opinion, if the common issues were first resolved by the district court upon a non-jury trial of the complaint for declaratory relief

"the effect of the action of the District Court could be, as the Court of Appeals believed, 'to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit,' for determination of the issue of clearances by the judge might 'operate either by way of *res judicata* or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim.' 252 F.2d at 874." 359 U.S. at 504.

This underlying premise was equally implicit in *Dairy Queen Inc. v. Wood*, 369 U.S. 469 (1962), and *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160 (1963). It was later confirmed in *Katchen v. Landy*, 382 U.S. 323, 336-40 (1966), where the Court upheld the right of a bankruptcy trustee to recover a preference through a summary proceeding, for which a jury is not required, over the objection that

a plaintiff joined demands for injunctive relief and damages in one suit, the defendant who made a timely demand for a jury could not be deprived of his constitutional right to a jury trial by earlier resolution of the issues with respect to the equitable claim.

this procedure would deprive the claimant of his right to a jury trial, to which he would be entitled under the Seventh Amendment in a plenary proceeding under §60 of the Bankruptcy Act, 11 U.S.C. §96; *Schoenthal v. Irving Trust Company*, 287 U.S. 92, 94-95 (1932). *Katchen* stated:

"In practical effect, the denial of a jury trial would be no less were the bankruptcy court merely to determine the existence and amount of the preference, since that determination would be entitled to *res judicata* effect in any subsequent plenary action. And we have held that equity courts have power to decree complete relief and for that purpose may accord what would otherwise be legal remedies.

• • • • •

"For, as we have said, determination of the preference issues in the equitable proceeding would in any case render unnecessary a trial in the plenary action because of the *res judicata* effect to which that determination would be entitled. . . . Both *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim." 382 U.S. 338, 339-40.

In view of the limited scope of the Supreme Court's decision in *Beacon Theatres* and its inherent respect for the doctrine of collateral estoppel, we do not view the case, either in logic or in spirit, as requiring us to hold that after a litigant has had a full and fair non-jury trial of issues he may always invoke the Seventh Amendment to obtain a second trial of the same issues. To so hold would violate basic principles of fairness, finality, certainty, econ-

omy in utilization of judicial resources,⁴ avoidance of possibly inconsistent results, and achievement of the "just, speedy and inexpensive determination of every action," Rule 1, F.R.Civ.P.⁵ Were there any doubt about the matter, it should in any event be resolved against the defendants in this case for the reason that, although they were fully aware of the pendency of the present suit throughout the non-jury trial of the SEC case, they made no effort to protect their right to a jury trial of the damage claims asserted by plaintiffs, either by seeking to expedite trial of the present action or by requesting Judge Duffy, in the exercise of his discretion pursuant to Rule 39(b), (c), F.R.Civ.P.,⁶ to order that the issues in the SEC case be tried by a jury or before an advisory jury. Thus, to the extent that foreseeability of the possible use of collateral estoppel in a later private action for damages is a factor in

4 Although plaintiffs have joined with Parklane and Somekh in the present suit other persons who were not parties to the SEC proceeding, they advised the district court that, in the event their summary judgment motion was granted, they would drop their suit against the others, terminating the litigation altogether except for damages.

5 As Justice White observed in *Blonder-Tongue, supra*, the fundamental question is "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue," 402 U.S. at 328, a question which the Court answered in the negative.

6 Rule 39 provides in pertinent part:

"(b) *By the Court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

"(c) *Advisory Jury and Trial by Consent.* In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."

determining whether application of estoppel principles would be unjust,⁷ see *The Evergreens v. Nunan*, 141 F.2d 927, 929 (2d Cir.), cert. denied, 323 U.S. 720 (1944), no unfairness exists in the present case, because the defendants, being parties to two suits pending at the same time, were fully aware of the estoppel consequences.

Notwithstanding the Supreme Court's respect for the doctrine of collateral estoppel, defendants urge that their right to a jury trial under the Seventh Amendment must be preserved on historical grounds. Frankly conceding in their brief that if there had been mutuality of parties "the application of collateral estoppel could result in the loss of a jury trial right" (Appellees brief p. 15), they argue that since principles of non-mutual estoppel had not yet evolved in 1791, they must be disregarded in construing a constitutional amendment which preserves the right to a jury trial at common law as it then existed. In support of this position they point to *Dimick v. Schiedt*, 293 U.S. 474 (1935), where the Court looked to custom governing the right to a jury in 1791 to determine whether a personal injury plaintiff could be forced to accept a court's increased award of damages after a jury verdict had been found inadequate or whether the plaintiff was entitled to a new jury for the assessment of damages as a matter of constitutional right. Such a strict historical approach to the Seventh Amendment, which would freeze the jury trial at

7 It has been observed that

"Since one of the major functions of injunctive actions brought by the Commission is the alerting of potential private plaintiffs to actionable violations of the securities laws, the defendants should be well aware of the possibility of multiple private suits at a later date. Thus, it is unlikely that the defendants would regard the injunction as unimportant and therefore fail either to defend the first suit vigorously or to appeal an adverse judgment." (Footnotes omitted). Comment: The Effect of SEC Injunctions in Subsequent Private Damage Actions—*Rachal v. Hill*, 71 Colum. L. Rev. 1329, 1338-39 (1971).

its 1791 level—no more, no less—has been somewhat weakened by recent pronouncements. See, e.g., *Ross v. Bernhard*, 396 U.S. 531 (1970), where the Court found that because of the “extensive and possibly abstruse historical inquiry” involved, such an analysis is “most difficult to apply.” 396 U.S. at 538, n.10. The inquiry into pre-1791 practice is complicated by the paucity of precedent and the merger of law and equity, see *The Supreme Court*, 1969 Term, 84 Harv. L. Rev. 1, 175-76; McCoid, *Procedural Reform and The Right to a Jury Trial: A Study of Beacon Theatres Inc. v. Westover*, 116 U. Pa. L. Rev. 1 (1967). Since the term “Suits at common law” as used in the Seventh Amendment does not embrace equitable claims, it becomes necessary to determine, with respect to rights and remedies arising out of statutes that were not in existence in 1791, what the closest common law analogue might have been, which is often a tenuous procedure at best. See Note, *United States v. J. B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), 88 Harv. L. Rev. 1035, 1041-42 (1975); Note, *Congressional Provision for Nonjury Trial under the Seventh Amendment*, 38 Yale L.J. 401, 418 (1973). As the Supreme Court said more recently in *Bloom v. Illinois*, 391 U.S. 194 (1968), in determining whether a Sixth Amendment right to trial by jury existed in criminal contempt proceedings, “the ultimate question is not whether the traditional doctrine is historically correct but whether the rule that criminal contempts are never entitled to a jury trial is a necessary or an acceptable construction of the Constitution. Cf. *Thompson v. Utah*, 170 U.S. 343, 350 (1898).” 391 U.S. at 200 n.2.

In any event, application of a strict historical standard would not mandate a jury retrial of the present case, which is distinguishable in significant respects from *Dimick*. That case involved a suit for damages for personal injuries of

the common garden-variety type that had long existed at common law prior to 1791 and had always been triable by jury. Moreover, the pre-1791 law clearly prohibited the Court from increasing a jury award in such a case, 293 U.S. at 482. In the present case, on the other hand, we find no 18th century counterpart or analogue to an SEC proceeding for injunctive relief or a stockholders’ suit based on an implied right of action created by antifraud provisions of federal securities laws. We therefore cannot, by reference to 1791 precedents, determine what jury trial and collateral estoppel rules would have been developed or applied by common law courts of that period in such suits if these statutes of recent vintage, which contemplated both public and supplementary private enforcement, see *J. I. Case v. Borak*, 377 U.S. 426, 432 (1964), had been in effect. Had the 1791 courts been faced with the question, perhaps they, like their 20th century successors, would have decided that the statutory purposes would best be facilitated by permitting private plaintiffs to utilize the SEC-obtained findings and by easing the mutuality requirement accordingly, giving collateral estoppel effect to such findings against a party who had had a full and fair trial of the issues in the case brought by the SEC rather than allow him a second trial before a jury. Moreover, in *Dimick* the trial judge’s determination regarding the inadequacy of the verdict (labelled a “compromise” by the Court) was not questioned, and because of its clear inadequacy the plaintiff there, unlike the defendants here, did not receive a fair first trial. Here, in contrast, there was nothing unfair or erroneous about the district court’s findings and decision in the SEC proceeding, which have been affirmed by us. See 558 F.2d 1083 (2d Cir. 1977).

In view of these obvious limitations upon a historical inquiry, including the inability to determine what would

have been the precise 1791 boundaries with respect to laws that were not then in existence, much less dreamed of, and the willingness of the law courts even in 1791 to respect decrees and findings in equity, see Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 Harv. L. Rev. 442, 451, 454-55 (1971), we should not be confined to a rigid strait-jacket merely because of the lack of a common law analogue and the absence of any 1791 authority for extension of the equitable doctrine of collateral estoppel to the present case.

Our disagreement with the Fifth Circuit's decision in *Rachal* should come as no surprise to those familiar with some of our recent decisions bearing on the question presented. For instance, in *Crane Co. v. American Standard, Inc.*, 490 F.2d 332 (2d Cir. 1973), we held that a decree in equity had "preclusive effect in a subsequent action at law between the same parties," 490 F.2d at 343. Although *Crane* did not involve non-mutual estoppel, Judge Friendly intimated that the same principles would apply in a non-mutual case to estop the party which had had a full and fair opportunity to litigate the same issues in an equity proceeding, citing with approval the Note by Shapiro and Coquillette, *supra*, which had been highly critical of *Rachal* and stating that "we are not at all sure that *Rachal* was correctly decided," 490 F.2d at 343 n.15. Any doubt on this score was removed in *Goldman, Sachs & Co. v. Edelstein*, 494 F.2d 76 (2d Cir. 1974), where, in a mandamus proceeding involving several actions, each of which had asserted the same basic claims by different plaintiffs against a common defendant, we directed that an action in which a jury had been demanded be tried first, "[i]n order to foreclose the potential destruction of the defendant's right to a jury trial" which would occur if one of the non-jury cases presenting the same issues first went to trial and resulted in findings adverse to the defendants. In the

present case that event has occurred, resulting in the destruction by collateral estoppel of the defendants' right to a jury trial of the same issues.⁸

For these reasons we reverse the order of the district court and remand the case to it for further proceedings not inconsistent with the foregoing.

⁸ Nor is Judge Oakes' dissent in *Goldman, Sachs & Co. v. Edelstein*, *supra*, inconsistent with the result reached by us here since Goldman, Sachs took timely steps to protect its right to a jury trial from being destroyed through collateral estoppel by objecting to trial of the non-jury suits until the jury actions against it had first been tried. The dissent was persuaded that under such circumstances collateral estoppel effect should not be given to the findings in a non-jury case if it first proceeded to trial. In the present case, however, no such timely objection was voiced or other steps taken by Parklane or Somekh to protect their right to a jury trial of the issues before the non-jury SEC proceeding went to trial.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of November, one thousand nine hundred and seventy-seven.

Present:

HON. WALTER R. MANSFIELD

HON. WILLIAM H. TIMBERS

Circuit Judges

HON. JOHN F. DOOLING

District Judge

77-7163

 LEO M. SHORE,

Plaintiff-Appellant,

v.

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMERKH, HERBERT N. SOMEKH, as Trustee of Trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE.

 Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER,
Deputy Clerk

Docketed as a Judgment #78,416
on January 5, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of December, one thousand nine hundred and seventy-seven.

Present:

HON. WALTER R. MANSFIELD

HON. WILLIAM H. TIMBERS

Circuit Judges

HON. JOHN F. DOOLING

District Judge

77-7163

LEO M. SHORE,

Plaintiff-Appellant,

v.

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants,

PARKLANE HOSIERY Co., Inc. and HERBERT N. SOMEKH,

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellees.

Upon consideration thereof, it is ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO

A. Daniel Fusaro

Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of December, one thousand nine hundred and seventy-seven.

77-7163

LEO M. SHORE,

Plaintiff-Appellant,

v.

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants,

PARKLANE HOSIERY Co., INC. and HERBERT N. SOMEKH,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN

Irving R. Kaufman

Chief Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEO M. SHORE,

Plaintiff,

against

PARKLANE HOSIERY COMPANY, INC., *et al.*,

Defendants.

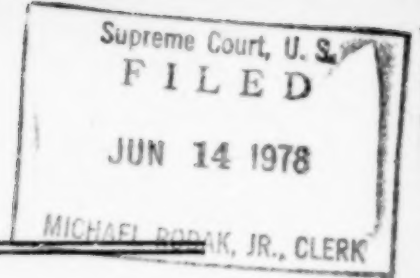
The within motion is denied. *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970).

So ordered.

s/ INZER B. WYATT
U.S.D.J.

Jan. 14, 1977

APPENDIX



IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and
HERBERT N. SOMEKH,

Petitioners,

against

LEO M. SHORE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED MARCH 17, 1978
CERTIORARI GRANTED MAY 1, 1978

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Relevant Docket Entries

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEO M. SHORE,

Plaintiff-Appellant,

—against—

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH,

Defendants-Appellees.

| <u>Date</u> | <u>Proceedings</u> |
|--------------------|--|
| March 17, 1977 | Filed petition for permission to appeal. |
| April 5, 1977 | Filed order granting petition for leave to appeal. |
| September 12, 1977 | Argument heard (By: Mansfield, Timbers, CJJ, Dooling, DJ). |
| November 1, 1977 | Judgment reversed and remanded, Mansfield, CJ. |
| November 1, 1977 | Filed judgment. |
| November 14, 1977 | Filed petition for rehearing and rehearing in banc, appellees. |
| December 20, 1977 | Filed order denying petition for rehearing. |
| December 20, 1977 | Filed order denying petition for rehearing in banc. |
| December 27, 1977 | Issued mandate. |

Relevant Docket Entries

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

| <u>Date</u> | <u>Proceedings</u> |
|-------------------|---|
| November 13, 1974 | Filed complaint and issued summons. |
| March 21, 1975 | Filed Pltffs Affdvt in support of Class Action Determination. |
| April 22, 1975 | Filed Pltffs Notice of Motion for Class Determination, ret. 5/2/75. |
| April 30, 1975 | Filed Affidavit in opposition to motion for Class Action Determination by Steven A. Sanders. |
| May 5, 1975 | Filed Memo. End. on affidavit dtd. 3/21/75. Motion granted without opposition. Settle Order on Notice. Wyatt, J. |
| June 23, 1975 | Filed Defts' ANSWER. |
| July 14, 1975 | Filed Order that the notice annexed to this Order is the best notice practicable under the circumstances & shall be mailed by the pltff within 60 days of the date hereof, to all of the Class Members. Carter J. |
| May 24, 1976 | Filed Pltffs Affidavit & Notice of Motion for an order granting pltff leave to file an amended complaint. etc, rtble before Wyatt, J. on 6-4-76. |

Relevant Docket Entries

| <u>Date</u> | <u>Proceedings</u> |
|-------------------|---|
| September 7, 1976 | Filed memo endorsed on motion filed 5-24-76. The within motion is granted as indicated. Wyatt, J. |
| October 5, 1976 | Filed Pltffs amended class action complaint. Pltff request trial by jury. |
| November 15, 1976 | Filed ANSWER of defts Parklane Hosiery Co. Inc. Charles B. Yaffe, D.N. David and Neil B. Persky to the amended complaint. |
| November 15, 1976 | Filed Answer of debt H.N. Somekh, D.D. Somekh and H.N. Somekh, to the amended complaint. |
| November 24, 1976 | Filed Pltffs Affidvit & Notice of Motion for an order granting summary judgment to pltff etc, rtble on 12-17-76. |
| January 17, 1977 | Filed Memo. End. on motion 11-24-76. Motion Denied. Wyatt J. |
| January 24, 1977 | Filed Pltffs. Notice of Motion to Amend Interlocutory Order. Ret. 2/4/77. |
| February 14, 1977 | Filed Memo-End on Pltffs. motion filed on 1-24-77. The within motion is granted. Settle Order. So Ordered. WYATT, J. |
| March 7, 1977 | Filed order that the order denying pltffs motion for summary judgment, ent. 1-14-77 is hereby amended. SO ORDERED. PIERCE, J. |

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

PLAINTIFF REQUESTS

TRIAL BY JURY

Plaintiff, by its attorneys, Kass, Goodkind, Wechsler & Gerstein, complaining of the defendants, alleges upon information and belief, except as to paragraphs 2(f) and 3, which are alleged upon knowledge:

JURISDICTION

1. Counts I and II of this Complaint are brought under Section 27 of the Securities Exchange Act of 1934 (the "34 Act") to enforce liabilities created by Sections 10(b) and 14(a) of the 34 Act, by Rules 10b-5, and 14a-9 promulgated thereunder, and by Section 20(a). Count III is brought under the principles of pendent jurisdiction to enforce liabilities created by common law.

CLASS ACTION ALLEGATIONS

2. This action is properly maintainable as a class action under the provisions of FRCP Rule 23(b)3.

(a) The class consists of all shareholders of defendant Parklane Hosiery Company, Inc. ("Parklane"), other than defendants, from June 15, 1973 to September 14, 1974, the record date specified in

Complaint

the Proxy Statement dated September 24, 1974 (the "Proxy Statement") issued in connection with the merger (the "Merger") between New PLHC Corp. ("New Corp.") with and into Parklane.

(b) On information and belief, there were several thousand persons who were beneficial owners of the common stock of Parklane during the class period.

(c) The members of the class are scattered throughout the United States and are so numerous as to make it impractical to bring them all before the Court.

(d) There are common questions of law and fact involved in this action: for example, whether defendants have engaged in schemes and artifices to defraud the members of the class while eliminating them as shareholders of Parklane by merging New Corp. into Parklane at terms grossly unfair to the members of the class; whether in furtherance of such scheme, defendants have undervalued Parklane stock for the purpose of benefiting defendants at the expense and to the damage of the class members; whether the Proxy Statement contains material misstatements and omits to state facts necessary to make the statements made not misleading; and whether the defendants thereby violated Sections 10(b) and 14 of the 34 Act and their fiduciary duties under the common law. Other common questions of law and fact are described more fully later in the complaint.

(e) Plaintiff's claims are typical of the class in that all members of the class will be damaged by

Complaint

the fraudulent and unfair merger in the same manner and in the same amount per share of Parklane held.

(f) Plaintiff will fairly and adequately protect the interest of the class. Plaintiff has retained attorneys who are thoroughly experienced with securities litigation. In this connection, the attorneys for the class are "av" rated by Martindale-Hubbell Law Directory, and have extensive experience in stockholders' class actions.

(g) The class action is superior to any other method available for a fair and efficient adjudication of the controversy since it would be impractical and undesirable for each of the members of the class who may suffer damages, in light of their relatively small claims, to bring separate actions in various parts of the country. A class action based on a fraudulent and unfair merger is a proper use of the class action device and no unusual difficulties are likely to be encountered in the management of this class action.

THE PARTIES

3. Plaintiff, an individual residing at 84-37 Avon Street, Jamaica, New York owns and has owned at all relevant times, 4,300 shares of Parklane.

4. Defendant Parklane is a corporation organized under the laws of the State of New York with its principal place of business in the State of New York. Its common stock was publicly traded until the time of the Merger.

Complaint

5. Defendants Herbert N. Somekh, Charles B. Yaffe, David N. David and Neil B. Persky (the "Directors") constituted at all times relevant to the wrongs alleged, the majority of the Board of Directors of Parklane and three out of the five directors of Parklane constituted at all times relevant to the wrongs alleged all of the Board of Directors of New Corp., a New York corporation which went out of existence upon the merger. At all times relevant to the wrongs alleged the defendants controlled both corporations.

6. Defendants Herbert N. Somekh, his wife, defendant Denise D. Somekh, Herbert Somekh as trustee of trusts for the benefit of his children, Charles Yaffe, his wife, Beulah Yaffe, Carl Appel, his wife, Esther Appel, and their children, Lawrence Appel and Florence Mukamel, Arthur Gold, Stanley Kuschner and Harold Stone are and were at the time alleged herein controlling shareholders of Parklane and New Corp.

COUNT I

7. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6.

8. This count is brought to enforce rights arising out of Section 10(b) of the 34 Act, Rule 10b-5 promulgated thereunder, and Section 20(a) of the 34 Act.

9. In December, 1968 Parklane made its first public offering of its common stock at a price of \$9.00 per share. As a result, the book value of the common stock of Parklane owned by the defendants at the time was increased from \$1.54 to \$3.39.

Complaint

10. Between July, 1969 up to the present, the market value of Parklane has declined while overall during the period of time the financial structure of Parklane, in terms of cash per share, assets per share, book value per share, shareholders' equity and other relevant factors, has significantly improved.

11. During 1973, in the light of the significantly improved financial status of Parklane and the low market value of the Parklane stock, the Directors and controlling shareholders saw the opportunity to gain for themselves a higher proportional equity participation in Parklane at a cheap price and to "freeze out" the public minority shareholders.

12. Defendants then embarked on a conspiracy, device and scheme to acquire sole control of Parklane at a price which would be highly advantageous to the defendants, but unfair and damaging to the shareholders of Parklane, other than the defendants.

13. In furtherance of this conspiracy, device and scheme, during the period June 5, 1973 to July 30, 1974 the Directors caused Parklane to purchase large blocks of stock of Parklane in an aggregate of 121,054 shares of common stock at prices varying from a low of \$1.00 to a high of \$3.38, and at an average price of \$2.46 per share.

14. The purpose of such purchases, undisclosed to the members of the class, was to give defendants increased voting control over Parklane, and thereby facilitate their scheme to "freeze out" all public shareholders of Parklane.

15. In 1974, in furtherance of this conspiracy, device and scheme, the Directors incorporated New Corp. for the

Complaint

sole purpose of causing a merger of New Corp. with and into Parklane and under the relevant merger terms thereby "freeze out" the shareholders of Parklane, other than the defendants.

16. At the time of the incorporation of New Corp., the defendants caused 672,196 shares of common stock of Parklane representing 71.6% of the issued and outstanding stock of Parklane, to be transferred to New Corp. for an equivalent number of shares of New Corp. representing 100% of the issued and outstanding shares of New Corp.

17. Thereafter, the defendants caused three of the defendants to be elected to the Board of Directors of New Corp. Said three defendants constituted the entire Board of Directors of New Corp. and said three were at the same time three out of the five Directors constituting a majority of the Board of Directors of Parklane.

18. Other than the shares of Parklane, New Corp. had no assets or business purpose, but was formed solely for the purpose of "freezing out" the minority, the plaintiff class.

19. By virtue of New Corp.'s 71.6% interest in Parklane, by virtue of the substantially identical Board of Directors of the two corporations, the defendants herein had working and voting control of Parklane. Defendants used such control to cause New Corp. to merge with and into Parklane, as a result of which all of the issued and outstanding shares of Parklane issued to New Corp. were cancelled. Each share of New Corp. common stock, which was outstanding prior to the Merger and all of which was owned by the defendants, became one share of Parklane.

Complaint

The plaintiff class was paid \$2.00 per share cash from Parklane's assets in exchange for their shares of Parklane which were cancelled. The price of \$2.00 per share was far less than the real value of Parklane stock.

20. With respect to the \$2.00 merger price, the defendants have fraudulently represented to the members of the class that the price is fair and reasonable and represents the real value of Parklane stock.

21. The defendants knew that the \$2.00 price per share recommended by them was far less than the true value of the Parklane shares, but failed to disclose the same.

22. In furtherance of their conspiracy, device and scheme, the defendants caused the Proxy Statement to be distributed to the stockholders of Parklane for the sole purpose of complying with the federal and state statutory requirements with respect to holding a shareholders' meeting since the defendants themselves held the necessary votes to approve the Merger.

23. The Proxy Statement was no more than a transparent effort by the defendants to place the stamp of legality on their illicit scheme to eliminate the members of the class.

24. The Proxy Statement was, in itself, grossly misleading and fraudulent. The misstatements and omissions in the Proxy Statement are set forth in Count II of the complaint and such misstatements and omissions are included herein by reference.

25. In furtherance of the aforesaid scheme and conspiracy to defraud defendants have intentionally made

Complaint

their illegal take-over during the height of the "bear market" at a time when Parklane stock was selling far below past market prices.

26. Defendants thereby have "frozen out" the members of the class, all of the public minority stockholders, who have held their Parklane stock through difficult times and, thereby, the defendants acquired 100% control of Parklane at great advantage to themselves at the lowest possible price to themselves and at the highest possible expense and damage to the members of the class.

27. Defendants have intentionally and fraudulently failed to disclose the aforesaid device, scheme and conspiracy and all of the elements thereof to the members of the class, to their great damage.

28. In carrying out the foregoing fraudulent device, conspiracy and scheme, defendants have acted both singly and in concert, and are continuing to so act, to eliminate the shareholders of Parklane other than New Corp. by merging New Corp. into Parklane at grossly unfair terms. To achieve this plan, they conspired, jointly and severally, to defraud, deceive and mislead the shareholders of Parklane other than the defendants. Defendants' acts were carried out by use of the instrumentalities of interstate commerce and the mails.

29. By reason of the foregoing, defendants have violated Section 10(b) of the 34 Act, Rule 10b-5 promulgated thereunder and Section 20(a) of the 34 Act.

Complaint

COUNT II

30. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6 and 8 through 29.

31. Defendants caused Parklane to distribute by use of the mails and the means and instrumentalities of interstate commerce the Proxy Statement.

32. The Proxy Statement contained material misstatements and omitted to state material facts necessary in order to make the statements therein not false and misleading. The Proxy Statement was materially false and misleading in all of the following respects:

(a) In stating that the price of \$2.00 per share was fair to Parklane's shareholders other than the defendants.

(b) In failing to include in the Proxy Statement copies of opinions of Thomson & McKinnon Auchincloss, Kohlmeyer Inc. and Foster Securities Corporation, referred to in the Proxy Statement, as to the proposed price being offered to the shareholders in the Merger.

(c) In failing to properly disclose Parklane's present financial condition.

(d) In failing to disclose that, as a result of the Merger, the defendants' share in the assets, earnings, earnings capacity, cash flow and book value of Parklane would be vastly increased.

(e) In failing to disclose that the Merger was not necessary in order to avoid certain of the expenses of being a publicly held corporation, such as the

Complaint

expense of a transfer agent and such as the expense of being listed on the American Stock Exchange.

(f) In failing to disclose at the time of the Proxy Statement that there had been an offer of approximately \$1,100,000 for a leaseholding owned by Parklane.

(g) In failing to disclose any of the terms of the fraudulent scheme described in Count I herein, or even the very existence of the scheme to defraud the members of the class.

33. By reason of the foregoing, the defendants violated the provisions of Section 14(a) of the 34 Act and Rule 14a-9 promulgated thereunder, to the damage of the plaintiff and the members of the class.

COUNT III

34. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6, 8 through 29 and 30 through 33.

35. The aforesaid conspiracy, device, scheme and artifice to defraud on the part of the Parklane Directors and other defendants, and the acts and practices in the course of business carried on by them, as above described, constituted and continues to constitute (a) a breach of the fiduciary duty owed by each of them as directors and controlling shareholders to the minority shareholders of Parklane; (b) a breach of the duty of loyalty and good faith owed by each of them to the minority shareholders of Parklane in managing the affairs of Parklane; and (c) a breach of the

Complaint

duty owed by each of them to the minority shareholders of Parklane to act on decisions with respect to the business, properties and affairs of Parklane for the benefit of all of the shareholders of Parklane and not for the benefit of themselves.

36. As a result of the breaches of duty hereinbefore described, the shareholders of Parklane other than the defendants have suffered damages.

WHEREFORE, plaintiff prays for the following relief:

(a) That the plaintiff and the members of the class be awarded damages for their losses and defendants' profits;

(b) That the plaintiff and the members of the class be awarded punitive damages for the willful and outrageous conduct of the defendants;

(c) That plaintiff be awarded the cost and disbursements of this action, including reasonable attorneys' and experts' fees to be paid by the defendants; and

(d) That the plaintiff and the members of the class have such other and further relief as to the Court is just and equitable.

* * *

[PROOF OF SERVICE OMITTED IN PRINTING]

Answer**UNITED STATES DISTRICT COURT**

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Defendants, Parklane Hosiery Company, Inc., Herbert N. Somekh, Denise D. Somekh, Herbert N. Somekh, as Trustee, Charles B. Yaffe, Beulah Yaffe, David N. David, Neil B. Persky and Arthur Gold, by their attorneys, Jacobs Persinger & Parker, for their answer to the complaint herein:

FIRST: Deny each and every allegation contained in paragraph "1" of the complaint.

SECOND: Deny each and every allegation contained in the first paragraph of paragraph "2" of the complaint, except admit that plaintiff purports to bring this action under the provisions of F.R.C.P. 23(b)(3).

THIRD: Deny each and every allegation contained in subparagraph "(a)" of paragraph "2" of the complaint, except admit that a proxy statement dated September 24, 1974 was issued in connection with the merger to which proxy statement reference is made for the terms thereof.

FOURTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraphs "(b)" and "(c)" of paragraph "2" of the complaint.

FIFTH: Deny each and every allegation contained in subparagraphs "(d)", "(e)" and "(g)" of paragraph "2" of the complaint.

Answer

SIXTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(f)" of paragraph "2" of the complaint.

SEVENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" of the complaint.

EIGHTH: Deny each and every allegation contained in paragraph "5" of the complaint, except admit that New PLHC Corp., a New York corporation, was merged into Parklane.

NINTH: Deny each and every allegation contained in paragraph "6" of the complaint.

AS TO THE ALLEGED COUNT I

TENTH: With respect to paragraph "7" of the complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6" of the complaint as though the same were here set forth at length.

ELEVENTH: Deny each and every allegation contained in paragraph "8" of the complaint.

TWELFTH: Deny each and every allegation contained in paragraph "9" of the complaint, except admit that in December, 1968, Parklane sold to the public 300,000 shares of its common stock at a price of \$9 per share, and that the book value of shares of Parklane's common stock held prior to the public offering was increased (based upon

Answer

Parklane's shareholders' equity at June 29, 1968) from \$1.54 to \$3.39 per share.

THIRTEENTH: Deny each and every allegation contained in paragraph "10" of the complaint, except admit that in or about July, 1969 the market price of Parklane common stock as reported by the American Stock Exchange was higher than the market price of such stock on or about October 15, 1974 as reported by the American Stock Exchange.

FOURTEENTH: Deny each and every allegation contained in paragraphs "11", "12", "13", "14" and "15" of the complaint.

FIFTEENTH: Deny each and every allegation contained in paragraph "16" of the complaint, except admit that at or about the time New PLHC Corp. was organized it acquired 672,196 shares of common stock of Parklane, that said number of shares amounted to approximately 71.6% of the issued and outstanding stock of Parklane, that an equivalent number of shares of New PLHC Corp. was issued, and was 100% of its outstanding stock.

SIXTEENTH: Deny each and every allegation contained in paragraph "17" of the complaint, except admit that three of the defendants were elected to the Board of Directors of New PLHC Corp., that such defendants constituted the Board of Directors of New PLHC Corp., and that said persons were at the same time three of five directors constituting a majority of the Board of Directors of Parklane.

Answer

SEVENTEENTH: Deny each and every allegation contained in paragraph "18" of the complaint.

EIGHTEENTH: Deny each and every allegation contained in paragraph "19" of the complaint, except admit that New PLHC Corp. merged with and into Parklane, that the issued and outstanding shares of Parklane issued to New PLHC Corp. were cancelled and that each share of New PLHC Corp. common stock which was outstanding prior to the merger became one share of Parklane.

NINETEENTH: Deny each and every allegation contained in paragraphs "20", "21", "22", "23", "24", "25", "26", "27", "28" and "29" of the complaint.

AS TO THE ALLEGED COUNT II

TWENTIETH: With respect to paragraph "30" of the complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6" and "8" through "29" of the complaint as though the same were here set forth at length.

TWENTY-FIRST: Deny each and every allegation contained in paragraph "31" of the complaint, except admit that the proxy statement was distributed by use of the mails.

TWENTY-SECOND: Deny each and every allegation contained in paragraph "32" of the complaint and in each subparagraph thereof.

TWENTY-THIRD: Deny each and every allegation contained in paragraph "33" of the complaint.

Answer

S TO THE ALLEGED COUNT III

TWENTY-FOURTH: With respect to paragraph "34" of the complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "29" and "30" through "33" of the complaint as though the same were here set forth at length.

TWENTY-FIFTH: Deny each and every allegation contained in paragraphs "35" and "36" of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

TWENTY-SIXTH: The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

TWENTY-SEVENTH: Plaintiff's exclusive remedy for the payment of the fair value of his shares is governed by Section 623 of the New York Business Corporation Law.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

TWENTY-EIGHTH: On or about January 17, 1975, plaintiff commenced an appraisal proceeding entitled *In the Matter of the Petition of Leo M. Shore, etc.*, Index No. 1041/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

WHEREFORE, defendants demand judgment dismissing the complaint as against them, together with the costs and disbursements of this action.

* * *

[PROOF OF SERVICE OMITTED IN PRINTING]

**Order of the District Court Approving
Form of Notice to Class**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

LEO M. SHORE,

Plaintiff,

against

PARKLANE HOSIERY COMPANY, INC., *et al.*,

Defendants.

This Court, by order dated May 2, 1975 having determined that this action be maintained as a class action on behalf of all shareholders of Parklane Hosiery Company, Inc. ("Parklane") on September 14, 1974 (the "Class Members"); and the Court having ordered that notice of said class action determination, in form satisfactory to this Court, be mailed to all of the Class Members it is, hereby,

ORDERED, that the notice annexed to this Order is the best notice practicable under the circumstances and shall be mailed by the plaintiff in this action, within 60 days of the date hereof, to all of the Class Members.

Dated: New York, New York
July 9th, 1975

ROBERT L. CARTER
U.S.D.J.

*Order of the District Court Approving
Form of Notice to Class*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

NOTICE TO CERTAIN FORMER SHAREHOLDERS
OF PARKLANE HOSIERY COMPANY, INC.

The above-entitled action has been brought as a class suit. The complaint alleges that the defendants violated certain anti-fraud provisions of the Securities Exchange Act of 1934 and principles of common law in connection with the merger of Parklane Hosiery Company, Inc. ("Parklane") and New PLHC Corp. ("New Corp."), as a result of which the plaintiff and the class members (those owners of Parklane common stock on September 14, 1974, the record date in connection with the meeting at which the merger was voted on) sustained losses. The defendants are Parklane, and certain directors and allegedly controlling shareholders of Parklane, i.e., Herbert N. Somekh, Denise D. Somekh, Herbert N. Somekh, as Trustee of trusts for the benefit of his children, Charles B. Yaffe, Beulah Yaffe, David N. David, Neil B. Persky, Carl Appel, Esther Appel, Florence Mukamel, Arthur Gold, Stanley Kuschner and Harold Stone. Not all of the defendants have appeared in the action. The complaint seeks money damages for the members of the class.

The defendants appearing in this action deny any wrongdoing and plead various defenses. No court has yet passed upon the merits of the claims.

The Court has determined that this action is maintainable as a class action under the Federal Rules of Civil Pro-

*Order of the District Court Approving
Form of Notice to Class*

cedure and has directed that notice be given to the members of the class. The mailing of this notice is not to be construed in any way as an expression of any opinion by the Court as to the merits, but this notice is merely to advise of the pendency of this action and of certain rights former shareholders of Parklane may have with respect to this action.

THE PURPOSE OF THIS NOTICE is to ascertain whether you want to be included in the class of shareholders on whose behalf this action has been brought. You will be considered a member of such class unless you request that you be excluded. All members of the class who do not request exclusion (in the manner stated below) will receive the benefit of a favorable decision in the action and will be bound by an adverse judgment. Under no circumstances will you be required to contribute to the expenses involved in prosecuting this action. If there is a recovery, the Court will be asked to authorize payment of the litigation expenses and reasonable fees to plaintiff's attorneys and experts, to be deducted from the amount of the recovery. In case of recovery, you will be required to prove your membership in the class and your individual damage.

The attorneys representing the class are Kass, Goodkind, Wechsler & Gerstein, 122 East 42nd Street, New York, New York 10017.

You need not do anything if you want to be included in the class. If you desire to be excluded from the class, you should write a letter or postcard to the attorneys for the class at the above-listed address requesting exclusion. Please refer to *Shore v. Parklane Hosiery Company, Inc.*, 74 Civ. 4986, state your name and address, and also state the number of shares of Parklane which you owned on Sep-

*Order of the District Court Approving
Form of Notice to Class*

tember 14, 1974. Your written request for exclusion must be received by September 30, 1975. If you do not request exclusion, you have the right to enter an appearance herein through your own counsel.

Dated: New York, New York
September 8, 1975

RAYMOND F. BURGHARDT
Clerk for the UNITED STATES
DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

Notice of Motion to Amend the Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Stuart D. Wechsler, sworn to May 18, 1976, and the exhibit annexed thereto, plaintiff will move this Court at the United States District Courthouse, Foley Square, New York, New York, Courtroom 1506, at 2:30 p.m. on June 4, 1976, before Hon. Inzer B. Wyatt, for an order pursuant to FRCP Rule 15(a) granting plaintiff leave to file an amended complaint.

Dated: New York, New York
May 20, 1976

Yours, etc.

KASS, GOODKIND, WECHSLER & GERSTEIN

• • •

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**Memorandum Endorsement of the District Court
Granting Motion to Amend the Complaint**

The within motion is granted without passing upon any of the merits or not of the claim for rescission. Any defense to that claim may be raised in any manner appropriate under applicable rules.

So Ordered.

/s/ INZER B. WYATT

USDJ

September 3, 1976

Amended Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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PLAINTIFF REQUESTS

TRIAL BY JURY

Plaintiff, by its attorneys, Kass, Goodkind, Wechsler & Gerstein, complaining of the defendants, alleges upon information and belief, except as to paragraphs 2(f) and 3, which are alleged upon knowledge:

JURISDICTION

1. Counts I, II and III of this Complaint are brought under Section 27 of the Securities Exchange Act of 1934 (the "34 Act") to enforce liabilities created by Sections 10(b), 13(a), 14(a) and 20(a) of the 34 Act, and the Rules and Regulations promulgated thereunder. Count IV is brought under the principles of pendent jurisdiction to enforce liabilities created by common law.

CLASS ACTION ALLEGATIONS

2. This action is properly maintainable as a class action under the provisions of FRCP Rule 23(b)3.

(a) The class consists of all shareholders of defendant Parklane Hosiery Company, Inc. ("Park-

Amended Complaint

lane"), other than defendants on September 14, 1974, the record date specified in the Proxy Statement dated September 24, 1974 (the "Proxy Statement") issued in connection with the merger (the "Merger") between New PLHC Corp. ("New Corp.") with and into Parklane.

(b) There were over seven hundred persons who were beneficial owners of the common stock of Parklane during the class period.

(c) The members of the class are scattered throughout the United States and are so numerous as to make it impractical to bring them all before the Court.

(d) There are common questions of law and fact involved in this action; for example, whether defendants have engaged in schemes and artifices to defraud the members of the class while eliminating them as shareholders of Parklane by merging New Corp. into Parklane at terms grossly unfair to the members of the class; whether in furtherance of such scheme, defendants have undervalued Parklane stock for the purpose of benefiting defendants at the expense and to the damage of the class members; whether the Proxy Statement contains material misstatements and omits to state facts necessary to make the statements made not misleading; and whether the defendants thereby violated Sections 10(b) and 14 of the 34 Act and their fiduciary duties under the common law. Other common questions of law and fact are described more fully later in the complaint.

Amended Complaint

(e) Plaintiff's claims are typical of the class in that all members of the class will be damaged by the fraudulent and unfair merger in the same manner and in the same amount per share of Parklane held.

(f) Plaintiff will fairly and adequately protect the interest of the class. Plaintiff has retained attorneys who are thoroughly experienced with securities litigation. In this connection, the attorneys for the class are "av" rated by Martindale-Hubbell Law Directory and have extensive experience in stockholders' class actions.

(g) The class action is superior to any other method available for a fair and efficient adjudication of the controversy since it would be impractical and undesirable for each of the members of the class who may suffer damages, in light of their relatively small claims, to bring separate actions in various parts of the country. A class action based on a fraudulent and unfair merger is a proper use of the class action device and no unusual difficulties are likely to be encountered in the management of this class action.

THE PARTIES

3. Plaintiff, an individual residing at 84-37 Avon Street, Jamaica, New York, owns and has owned at all relevant times, 4,300 shares of Parklane.

4. Defendant Parklane is a corporation organized under the laws of the State of New York with its principal place of business in the State of New York. Its common stock was publicly traded until the time of the Merger.

Amended Complaint

5. Defendants Herbert N. Somekh, Charles B. Yaffe, David N. David and Neil B. Persky (the "Directors") constituted at all times relevant to the wrongs alleged, the majority of the Board of Directors of Parklane and three out of the five directors of Parklane constituted at all times relevant to the wrongs alleged, all of the Board of Directors of New Corp., a New York corporation which went out of existence upon the merger. At all times relevant to the wrongs alleged the defendants controlled both corporations.

6. Defendants Herbert N. Somekh, his wife, defendant Denise D. Somekh, Herbert Somekh as trustee of trusts for the benefit of his children, Charles Yaffe, his wife, Beulah Yaffe, Carl Appel, his wife, Esther Appel, and their children, Lawrence Appel and Florence Mukamel, Arthur Gold, Stanley Kuschner and Harold Stone are and were at the time alleged herein controlling shareholders of Parklane and New Corp.

COUNT I

7. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6.

8. This count is brought to enforce rights arising out of Section 10(b) of the 34 Act, Rule 10b-5 promulgated thereunder, and Section 20(a) of the 34 Act.

9. In December, 1968 Parklane made its first public offering of its common stock at a price of \$9.00 per share. As a result, the book value of the common stock of Parklane owned by the defendants at the time was increased from \$1.54 to \$3.39.

Amended Complaint

10. As part of a scheme to defraud and a deceptive course of business, defendant Somekh caused Parklane to solicit its shareholders with false and misleading proxy materials for the purpose of converting Parklane to a privately-owned company as part of a plan conceived by Somekh to avail himself of Parklane's corporate assets in order to reduce his large personal indebtedness. In that connection defendant Somekh owned and controlled, directly or indirectly, a sufficient number of Parklane shares to determine the outcome of a shareholder vote in favor of converting Parklane to a privately-owned company. As part of this plan, public Parklane shareholders were to receive \$2.00 per share. In the proxy materials used and disseminated to Parklane shareholders, the defendants made and caused to be made untrue statements of material facts and omitted to state material facts, as more fully described below.

11. In or about 1971, defendant Somekh personally borrowed approximately \$900,000 from a bank, and thereafter, borrowed approximately \$300,000 from two other banks. In or about September, 1973, the lending banks became insistent that defendant Somekh commence to reduce these outstanding financial obligations.

12. In or about June 1973, in attempting to reduce his large personal indebtedness, defendant Somekh and the other directors embarked upon a plan which provided for the conversion of Parklane from a public to a privately-owned company, and thereafter, once Parklane became privately owned [and under Somekh's control] to cause Parklane to purchase Somekh's personal real estate holdings in exchange for cash and notes which Somekh, in turn, would utilize in reducing his personal indebtedness to the banks.

Amended Complaint

13. In furtherance of this conspiracy, device and scheme, during the period June 5, 1973 to July 30, 1974 the Directors caused Parklane to purchase large blocks of stock of Parklane in an aggregate of 121,054 shares of common stock at prices varying from a low of \$1.00 to a high of \$3.38, and at an average price of \$2.46 per share.

14. The purpose of such purchases, undisclosed to the members of the class, was to give defendants increased voting control over Parklane, and thereby facilitate their scheme to "freeze out" all public shareholders of Parklane.

15. In 1974, in furtherance of this conspiracy, device and scheme, the Directors incorporated New Corp. for the sole purpose of causing a merger of New Corp. with and into Parklane and under the relevant merger terms thereby "freeze out" the shareholders of Parklane, other than the defendants.

16. At the time of the incorporation of New Corp., the defendants caused 672,196 shares of common stock of Parklane representing 71.6% of the issued and outstanding stock of Parklane, to be transferred to New Corp. for an equivalent number of shares of New Corp., representing 100% of the issued and outstanding shares of New Corp.

17. Thereafter, the defendants caused three of the defendants to be elected to the Board of Directors of New Corp. Said three defendants constituted the entire Board of Directors of New Corp. and said three were at the same time three out of the five Directors constituting a majority of the Board of Directors of Parklane.

Amended Complaint

18. Other than the shares of Parklane, New Corp. had no assets or business purpose, but was formed solely for the purpose of "freezing out" the minority, the plaintiff class.

19. By virtue of New Corp.'s 71.6% interest in Parklane, and by virtue of the substantially identical Board of Directors of the two corporations, the defendants herein had working and voting control of Parklane. Defendants used such control to cause New Corp. to merge with and into Parklane, as a result of which all of the issued and outstanding shares of Parklane issued to New Corp. were cancelled. Each share of New Corp. common stock, which was outstanding prior to the Merger and all of which was owned by the defendants, became one share of Parklane. The plaintiff class was paid \$2.00 per share cash from Parklane's assets in exchange for their shares of Parklane which were cancelled. The price of \$2.00 per share was far less than the real value of Parklane stock.

20. With respect to the \$2.00 merger price, the defendants have fraudulently represented to the members of the class that the price is fair and reasonable and represents the real value of Parklane stock.

21. The defendants knew that the \$2.00 price per share recommended by them was far less than the true value of the Parklane shares, but failed to disclose the same.

22. In furtherance of their conspiracy, device and scheme, the defendants caused the Proxy Statement to be distributed to the stockholders of Parklane.

23. The Proxy Statement was no more than a transparent effort by the defendants to place the stamp of legality on their illicit scheme to eliminate the members of the class.

Amended Complaint

24. The Proxy Statement was, in itself, grossly misleading and fraudulent. The misstatements and omissions in the Proxy Statement are set forth in Count II of the complaint and such misstatements and omissions are included herein by reference.

25. Defendants thereby have illegally "frozen out" the members of the class, all of the public minority stockholders, for the benefit of defendant Somekh who needed Parklane's assets in order to reduce his large personal indebtedness, to the damage of the members of the class.

26. Defendants have intentionally and fraudulently failed to disclose the aforesaid device, scheme and conspiracy and all of the elements thereof to the members of the class, to their great damage.

27. In carrying out the foregoing fraudulent device, conspiracy and scheme, defendants have acted both singly and in concert to eliminate the shareholders of Parklane other than New Corp. by merging New Corp. into Parklane at grossly unfair terms. To achieve this plan, they conspired, jointly and severally, to defraud, deceive and mislead the shareholders of Parklane other than the defendants. Defendants' acts were carried out by use of the instrumentalities of interstate commerce and the mails.

28. By reason of the foregoing, defendants have violated Section 10(b) of the 34 Act, Rule 10b-5 promulgated thereunder and Section 20(a) of the 34 Act.

COUNT II

29. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6 and 8 through 27.

Amended Complaint

30. Defendants caused Parklane to distribute by use of the mails and the means and instrumentalities of interstate commerce the Proxy Statement.

31. The Proxy Statement contained material misstatements and omitted to state material facts necessary in order to make the statements therein not false and misleading including, *inter alia*, the following:

(a) It made statements as to various reasons why Parklane would be converted to a privately-owned company, when in fact, the true undisclosed reason for Parklane's conversion in corporate status was that Somekh was using such device in aid of meeting his personal financial obligations when there was no valid corporate purpose for such conversion in Parklane's status;

(b) It made statements concerning the termination of negotiations with the Federal Reserve Bank of New York ("FRB") with regard to Parklane's leasing of property located in New York City from the FRB, when in fact, the defendants failed to disclose the existence of ongoing negotiations with the FRB concerning the cancellation of such leasehold rights which negotiations could have resulted in Parklane receiving substantial benefits;

(c) It made statements that Parklane had employed two appraisers to determine the fair value of Parklane stock, when in fact, the defendants failed to disclose in the proxy statement of Parklane that the two appraisers were not provided with sufficient information in order to prepare and provide a true and complete valuation of such stock.

Amended Complaint

(d) It stated that the price of \$2.00 per share was fair to Parklane's shareholders other than the defendants.

(e) It did not include copies of opinions of the two appraisers.

(f) It failed to properly disclose Parklane's present financial condition.

(g) It failed to disclose that the Merger was not necessary in order to avoid certain of the expenses of being a publicly held corporation, such as the expense of a transfer agent and such as the expense of being listed on the American Stock Exchange.

(h) It failed to disclose any of the terms of the fraudulent scheme described in Count I herein, or even the very existence of the scheme to defraud the members of the class.

32. By reason of the foregoing, the defendants violated the provisions of Section 14(a) of the 34 Act and Rule 14a-9 promulgated thereunder, to the damage of the plaintiff and the members of the class.

COUNT III

33. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6, 8 through 28 and 30 and 31.

34. On or about July 10, 1975, for the fiscal year ending September 28, 1974 defendant Parklane, aided and abetted by the individual defendants, filed or caused to be filed

Amended Complaint

its annual report with the Securities and Exchange Commission (the "Commission") on Form 10-K, pursuant to Section 13(a) of the Act, and Rule 13a-1 promulgated thereunder. Said Form 10-K report contained statements of material facts which were false and misleading as more fully described in Count I of this complaint and was thereby not in compliance with the aforementioned Commission rules and regulations promulgated pursuant to Section 13(a) of the Act.

35. For the fiscal year ending September 30, 1975, defendant Parklane, aided and abetted by the individual defendants, failed to file its annual report on Form 10-K pursuant to Section 13(a) of the Act and Rule 13a-1 promulgated thereunder, which Form 10-K report was due to be filed with the Commission on or about December 30, 1975.

36. On or about October 23, 1975, defendant Parklane, aided and abetted by the individual defendants filed or caused to be filed its quarterly reports with the Commission on Form 10-Q, pursuant to Section 13(a) of the Act and Rule 13a-13 promulgated thereunder for the calendar quarters ending December 31, 1974 through June 30, 1975. Said reports contained materially false and misleading statements as more fully alleged in Count I of this complaint and was thereby not in compliance with the aforementioned Commission rules and regulations promulgated pursuant to Section 13(a) of the Act.

COUNT IV

37. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6, 8 through 28 and 30 and 31.

Amended Complaint

38. The aforesaid conspiracy, device, scheme and artifice to defraud on the part of the Parklane Directors and other defendants, and the acts and practices in the course of business carried on by them, as above described, constituted and continues to constitute (a) a breach of the fiduciary duty owed by each of them as directors and controlling shareholders to the minority shareholders of Parklane; (b) a breach of the duty of loyalty and good faith owed by each of them to the minority shareholders of Parklane in managing the affairs of Parklane; and (c) a breach of duty owed by each of them to the minority shareholders of Parklane to act on decisions with respect to the business, properties and affairs of Parklane for the benefit of all of the shareholders and not for the benefit of themselves.

39. As a result of the breaches of duty hereinbefore described, the shareholders of Parklane other than the defendants have suffered damages.

WHEREFORE, plaintiff prays for the following relief:

(a) That the plaintiff and the members of the class be awarded damages for their losses and defendants' profits;

(b) That the plaintiff and the members of the class be awarded punitive damages for the willful and outrageous conduct of the defendants;

(c) That the Merger be rescinded, that corrective proxy materials be distributed to each member of the class and that Parklane be required to offer to each of the class members the return of his shares or, in the alternative, the cash equivalent of his shares

Amended Complaint

as of the date of the Merger less the \$2.00 already received for such shares;

(d) That plaintiff be awarded the cost and disbursements of this action, including reasonable attorneys' and experts' fees to be paid by the defendants; and

(e) That the plaintiff and the members of the class have such other and further relief as to the Court is just and equitable.

* * *

[PROOF OF SERVICE OMITTED IN PRINTING]

**Answer to Amended Complaint of Certain Defendants
Including Parklane Hosiery Company, Inc.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Defendants, Parklane Hosiery Company, Inc. ("Parklane"), Charles B. Yaffe, David N. David and Neil B. Persky, by their attorneys, Jacobs Persinger & Parker, for their answer to the amended complaint herein:

FIRST: Deny each and every allegation contained in paragraph "1" of the amended complaint.

SECOND: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first paragraph of paragraph "2" of the amended complaint.

THIRD: Deny each and every allegation contained in subparagraph "(a)" of paragraph "2" of the amended complaint, except admit that a proxy statement dated September 24, 1974 was issued in connection with the merger to which proxy statement reference is made for the terms thereof and refer to the ruling of the Court dated May 2, 1975 and the Order of the Court dated July 9, 1975.

FOURTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in

*Answer to Amended Complaint of Certain Defendants
Including Parklane Hosiery Company, Inc.*

subparagraphs "(b)" and "(c)" of paragraph "2" of the amended complaint.

FIFTH: With respect to subparagraph "(d)" of paragraph "2" of the amended complaint, deny that there is any proper or valid question of fact or law raised therein.

SIXTH: Deny each and every allegation contained in subparagraph "(e)" of paragraph "2" of the amended complaint.

SEVENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(f)" of paragraph "2" of the amended complaint.

EIGHTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(g)" of paragraph "2" of the amended complaint, except deny that there is any proper or valid basis for the claim of a fraudulent and unfair merger.

NINTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" of the amended complaint.

TENTH: Deny each and every allegation contained in paragraph "5" of the amended complaint, except admit that New PLHC Corp., a New York corporation, was merged into Parklane.

ELEVENTH: Deny each and every allegation contained in paragraph "6" of the amended complaint.

*Answer to Amended Complaint of Certain Defendants
Including Parklane Hosiery Company, Inc.*

AS TO THE ALLEGED COUNT I

TWELFTH: With respect to paragraph "7" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6" of the amended complaint as though the same were here set forth at length.

THIRTEENTH: Deny each and every allegation contained in paragraph "8" of the amended complaint.

FOURTEENTH: Deny each and every allegation contained in paragraph "9" of the amended complaint, except admit that in December 1968 Parklane sold to the public 300,000 shares of its common stock at a price of \$9 per share, and that the book value of shares of Parklane's common stock held prior to the public offering was increased (based upon Parklane's shareholders' equity at June 29, 1968) from \$1.54 to \$3.39 per share.

FIFTEENTH: Deny each and every allegation contained in paragraph "10" of the amended complaint.

SIXTEENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "11" of the amended complaint.

SEVENTEENTH: Deny each and every allegation contained in paragraphs "12", "13", "14" and "15" of the amended complaint.

EIGHTEENTH: Deny each and every allegation contained in paragraph "16" of the amended complaint, except admit that at or about the time New PLHC Corp. was organized it acquired 672,196 shares of common stock

*Answer to Amended Complaint of Certain Defendants
Including Parklane Hosiery Company, Inc.*

of Parklane, that said number of shares amounted to approximately 71.6% of the issued and outstanding stock of Parklane, that an equivalent number of shares of New PLHC Corp. was issued and was 100% of its outstanding stock.

NINETEENTH: Deny each and every allegation contained in paragraph "17" of the amended complaint, except admit that three of the defendants were elected to the Board of Directors of New PLHC Corp., that such defendants constituted the Board of Directors of New PLHC Corp., and that said persons were at the same time three of five directors of Parklane.

TWENTIETH: Deny each and every allegation contained in paragraph "18" of the amended complaint.

TWENTY-FIRST: Deny each and every allegation, contained in paragraph "19" of the amended complaint, except admit that New PLHC Corp. merged with and into Parklane, that the issued and outstanding shares of Parklane issued to New PLHC Corp. were cancelled and that each share of New PLHC Corp. common stock which was outstanding prior to the merger became one share of Parklane.

TWENTY-SECOND: Deny each and every allegation contained in paragraphs "20", "21", "22", "23", "24", "25", "26", "27" and "28" of the amended complaint.

AS TO THE ALLEGED COUNT II

TWENTY-THIRD: With respect to paragraph "29" of the amended complaint, repeat and reallege each and every alle-

*Answer to Amended Complaint of Certain Defendants
Including Parklane Hosiery Company, Inc.*

gation made in answer to paragraphs "1" through "6" and "8" through "27" of the amended complaint as though the same were here set forth at length.

TWENTY-FOURTH: Deny each and every allegation contained in paragraph "30" of the amended complaint, except admit that the proxy statement was distributed by use of the mails.

TWENTY-FIFTH: Deny each and every allegation contained in paragraph "31" of the amended complaint and in each subparagraph thereof.

TWENTY-SIXTH: Deny each and every allegation contained in paragraph "32" of the amended complaint.

AS TO THE ALLEGED COUNT III

TWENTY-SEVENTH: With respect to paragraph "33" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "28" and "30" and "31" of the amended complaint as though the same were here set forth at length.

TWENTY-EIGHTH: Deny each and every allegation contained in paragraph "34" of the amended complaint, except admit that the Parklane annual report on Form 10-K for the fiscal year ended September 28, 1974 was filed with the Securities and Exchange Commission on or about July 14, 1975.

TWENTY-NINTH: Deny each and every allegation contained in paragraph "35" of the amended complaint.

*Answer to Amended Complaint of Certain Defendants
Including Parklane Hosiery Company, Inc.*

THIRTIETH: Deny each and every allegation contained in paragraph "36" of the amended complaint, except admit that the Parklane quarterly reports on Form 10-Q for the fiscal quarters ended December 28, 1974, March 28, 1975 and June 27, 1975 were filed with the Securities and Exchange Commission on or about October 22, 1975.

AS TO THE ALLEGED COUNT IV

THIRTY-FIRST: With respect to paragraph "37" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "28" and "30" and "31" of the amended complaint as though the same were here set forth at length.

THIRTY-SECOND: Deny each and every allegation contained in paragraphs "38" and "39" of the amended complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

THIRTY-THIRD: The amended complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

THIRTY-FOURTH: The exclusive remedy for the payment of the fair value of the shares of any purported members of the purported plaintiff class is governed by Section 623 of the New York Business Corporation Law.

*Answer to Amended Complaint of Certain Defendants
Including Parklane Hosiery Company, Inc.*

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

THIRTY-FIFTH: On or about January 17, 1975, plaintiff Leo M. Shore commenced an appraisal proceeding entitled *In the Matter of the Petition of Leo M. Shore, etc.*, Index No. 1041/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

THIRTY-SIXTH: On or about January 23, 1975, certain purported members of the purported plaintiff class commenced an appraisal proceeding entitled *Pappalardo, et al. v. Parklane Hosiery Company, Inc.*, Index No. 1268/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

THIRTY-SEVENTH: The purported members of the purported plaintiff class are not entitled to rescission of the October 1974 merger of New PLHC Corp. into Parklane since they did not act promptly in asserting a demand for rescission.

WHEREFORE, defendants demand judgment dismissing the amended complaint as against them, together with the costs and disbursements of this action.

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[PROOF OF SERVICE OMITTED IN PRINTING]

**Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Defendants, Herbert N. Somekh, Denise D. Somekh and Herbert N. Somekh, as Trustee, by their attorneys, Jacobs Persinger & Parker, for their answer to the amended complaint herein:

FIRST: Deny each and every allegation contained in paragraph "1" of the amended complaint.

SECOND: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first paragraph of paragraph "2" of the amended complaint.

THIRD: Deny each and every allegation contained in subparagraph "(a)" of paragraph "2" of the amended complaint, except admit that a proxy statement dated September 24, 1974 was issued in connection with the merger to which proxy statement reference is made for the terms thereof and refer to the ruling of the Court dated May 2, 1975 and the Order of the Court dated July 9, 1975.

FOURTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraphs "(b)" and "(c)" of paragraph "2" of the amended complaint.

*Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh*

FIFTH: With respect to subparagraph "(d)" of paragraph "2" of the amended complaint, deny that there is any proper or valid question of fact or law raised therein.

SIXTH: Deny each and every allegation contained in subparagraph "(e)" of paragraph "2" of the amended complaint.

SEVENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(f)" of paragraph "2" of the amended complaint.

EIGHTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(g)" of paragraph "2" of the amended complaint, except deny that there is any proper or valid basis for the claim of a fraudulent and unfair merger.

NINTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" of the amended complaint.

TENTH: Deny each and every allegation contained in paragraph "5" of the amended complaint, except admit that New PLHC Corp., a New York corporation, was merged into Parklane.

ELEVENTH: Deny each and every allegation contained in paragraph "6" of the amended complaint.

AS TO THE ALLEGED COUNT I

TWELFTH: With respect to paragraph "7" of the amended complaint, repeat and reallege each and every

*Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh*

allegation made in answer to paragraphs "1" through "6" of the amended complaint as though the same were here set forth at length.

THIRTEENTH: Deny each and every allegation contained in paragraph "8" of the amended complaint.

FOURTEENTH: Deny each and every allegation contained in paragraph "9" of the amended complaint, except admit that in December 1968, Parklane sold to the public 300,000 shares of its common stock at a price of \$9 per share, and that the book value of shares of Parklane's common stock held prior to the public offering was increased (based upon Parklane's shareholders' equity at June 29, 1968) from \$1.54 to \$3.39 per share.

FIFTEENTH: Deny each and every allegation contained in paragraph "10" of the amended complaint.

SIXTEENTH: Deny each and every allegation contained in paragraph "11" of the amended complaint, except admit that in or about 1971 Herbert N. Somekh and Denise D. Somekh borrowed approximately \$900,000 from a bank.

SEVENTEENTH: Deny each and every allegation contained in paragraphs "12", "13", "14" and "15" of the amended complaint.

EIGHTEENTH: Deny each and every allegation contained in paragraph "16" of the amended complaint, except admit that at or about the time New PLHC Corp. was or-

*Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh*

ganized it acquired 672,196 shares of common stock of Parklane, that said number of shares amounted to approximately 71.6% of the issued and outstanding stock of Parklane, that an equivalent number of shares of New PLHC Corp. was issued and was 100% of its outstanding stock.

NINETEENTH: Deny each and every allegation contained in paragraph "17" of the amended complaint, except admit that three of the defendants were elected to the Board of Directors of New PLHC Corp., that such defendants constituted the Board of Directors of New PLHC Corp., and that said persons were at the same time three of five directors of Parklane.

TWENTIETH: Deny each and every allegation contained in paragraph "18" of the amended complaint.

TWENTY-FIRST: Deny each and every allegation contained in paragraph "19" of the amended complaint, except admit that New PLHC Corp. merged with and into Parklane, that the issued and outstanding shares of Parklane issued to New PLHC Corp. were cancelled and that each share of New PLHC Corp. common stock which was outstanding prior to the merger became one share of Parklane.

TWENTY-SECOND: Deny each and every allegation contained in paragraphs "20", "21", "22", "23", "24", "25", "26", "27" and "28" of the amended complaint.

AS TO THE ALLEGED COUNT II

TWENTY-THIRD: With respect to paragraph "29" of the amended complaint, repeat and reallege each and every

*Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh*

allegation made in answer to paragraphs "1" through "6" and "8" through "27" of the amended complaint as though the same were here set forth at length.

TWENTY-FOURTH: Deny each and every allegation contained in paragraph "30" of the amended complaint, except admit that the proxy statement was distributed by use of the mails.

TWENTY-FIFTH: Deny each and every allegation contained in paragraph "31" of the amended complaint and in each subparagraph thereof.

TWENTY-SIXTH: Deny each and every allegation contained in paragraph "32" of the amended complaint.

AS TO THE ALLEGED COUNT III

TWENTY-SEVENTH: With respect to paragraph "33" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "28" and "30" and "31" of the amended complaint as though the same were here set forth at length.

TWENTY-EIGHTH: Deny each and every allegation contained in paragraph "34" of the amended complaint, except admit that the Parklane annual report on Form 10-K for the fiscal year ended September 28, 1974 was filed with the Securities and Exchange Commission on or about July 14, 1975.

*Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh*

TWENTY-NINTH: Deny each and every allegation contained in paragraph "35" of the amended complaint.

THIRTIETH: Deny each and every allegation contained in paragraph "36" of the amended complaint, except admit that the Parklane quarterly reports on Form 10-Q for the fiscal quarters ended December 28, 1974, March 28, 1975 and June 27, 1975 were filed with the Securities and Exchange Commission on or about October 22, 1975.

AS TO THE ALLEGED COUNT IV

THIRTY-FIRST: With respect to paragraph "37" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "28" and "30" and "31" of the amended complaint as though the same were here set forth at length:

THIRTY-SECOND: Deny each and every allegation contained in paragraphs "38" and "39" of the amended complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

THIRTY-THIRD: The amended complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

THIRTY-FOURTH: The exclusive remedy for the payment of the fair value of the shares of any purported members

*Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh*

of the purported plaintiff class is governed by Section 623 of the New York Business Corporation Law.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

THIRTY-FIFTH: On or about January 17, 1975, plaintiff Leo M. Shore commenced an appraisal proceeding entitled *In the Matter of the Petition of Leo M. Shore, etc.*, Index No. 1041/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

THIRTY-SIXTH: On or about January 23, 1975, certain purported members of the purported plaintiff class commenced an appraisal proceeding entitled *Pappalardo, et al. v. Parklane Hosiery Company, Inc.*, Index No. 1268/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

THIRTY-SEVENTH: The purported members of the purported plaintiff class are not entitled to rescission of the October 1974 merger of New PLHC Corp. into Parklane

*Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh*

since they did not act promptly in asserting a demand for rescission.

WHEREFORE, defendants demand judgment dismissing the amended complaint as against them, together with the costs and disbursements of this action.

* * *

[PROOF OF SERVICE OMITTED IN PRINTING]

Plaintiff's Notice of Motion for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

S I R S :

PLEASE TAKE NOTICE, that upon the complaint and upon the annexed affidavit of Samuel K. Rosen sworn to November 24, 1976, copies of which are annexed hereto, plaintiff will move this Court at Room 1506, United States Courthouse, Foley Square, New York, New York on the 17th day of December 1976 at 2:30 P.M., or as soon thereafter as counsel can be heard, for an order granting summary judgment to plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, upon the ground that it appears from the complaint and the annexed affidavit that there is no genuine issue as to material facts and plaintiff is entitled to judgment as a matter of law, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
November 24, 1976

Yours, etc.

KASS, GOODKIND, WECHSLER
& GERSTEIN

* * *

[PROOF OF SERVICE OMITTED IN PRINTING]

**Opinion of the District Court
Denying Summary Judgment**

PRINTED AS APPENDIX E, p. 26a TO
THE PETITION FOR CERTIORARI

**Order of the District Court Amending
Interlocutory Order**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

LEO M. SHORE,

Plaintiff,

against

PARKLANE HOSIERY, COMPANY, INC., *et al.*,

Defendants.

This matter having come on for hearing upon plaintiff's motion for an order amending this Court's order entered January 14, 1977, which denied plaintiff's motion for summary judgment, to include therein certain statements required by 28 U.S.C.A. § 1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure required for a petition for permission to appeal, and this Court, upon reading the papers submitted in support of this motion, all prior papers and proceedings herein, and having heard, on February 10, 1977, argument of counsel, it is

ORDERED, that the order denying plaintiff's motion for summary judgment, entered January 14, 1977, herein is hereby amended to include the following:

(1) This order involves a controlling question of law as to which there is substantial ground for difference of opinion, to wit:

Whether the Court's findings of fact in a prior action commenced by the Securities and Exchange

*Order of the District Court
Amending Interlocutory Order*

Commission ("SEC") can, by the doctrine of collateral estoppel, be applied to a subsequent action by a different plaintiff, seeking legal and equitable relief, based on the same transactions as was the action commenced by the SEC, when (a) there was no right to a jury trial in that action and (b) the Court found that the subject transaction was effected by means of materially misleading statements and omissions.

(2) An immediate appeal from this order may materially advance the ultimate termination of this litigation.

Dated: New York, New York
March 3, 1977

So Ordered 3/4/77
/s/ INZER B. WYATT
U.S.D.J.

**Order of the Court of Appeals Granting
Petition for Leave to Appeal**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of April, one thousand nine hundred and seventy-seven.

LEO M. SHORE,

Plaintiff-Appellant,

against

PARKLANE HOSIERY COMPANY, INC., *et al.*,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the petitioner for leave to appeal under 28 USC § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure be and it hereby is granted.

.....
J. EDWARD LUMBARD

.....
WALTER R. MANSFIELD

.....
MURRAY I. GURFEIN
Circuit Judges

58a

**Opinion of the Court of Appeals Reversing the
Denial of Summary Judgment**

PRINTED AS APPENDIX A, pp. 1a-19a TO THE
PETITION FOR CERTIORARI

59a

**Judgment of the Court of Appeals Reversing the
Denial of Summary Judgment**

PRINTED AS APPENDIX B, pp. 20a-21a
TO THE PETITION FOR CERTIORARI

60a

**Order of the Court of Appeals Denying
Petition for Rehearing**

PRINTED AS APPENDIX C, pp. 22a-23a
TO THE PETITION FOR CERTIORARI

61a

**Order of the Court of Appeals Denying
Petition for Rehearing In Banc**

PRINTED AS APPENDIX D, pp. 24a-25a
TO THE PETITION FOR CERTIORARI

**Order of the Supreme Court of the United States
Allowing Certiorari**

SUPREME COURT OF THE UNITED STATES

No. 77-1305

PARKLANE HOSIERY COMPANY, INC., *et al.*,

Petitioners

v.

LEO M. SHORE

ORDER ALLOWING CERTIORARI. Filed May 1, 1978.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

APR 13 1978

MICHAEL RDDAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and
HERBERT N. SOMEKH,

Petitioners,

—against—

LEO M. SHORE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
Supreme Court of the United States
October Term, 1977
No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and
HERBERT N. SOMEKH,
Petitioners,

—against—
LEO M. SHORE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court (App. E of the Petition, p. 26a^{*}) was unreported. The opinion of the Court below (App. A, pp. 1a-19a) is reported at 565 F. 2 (2d Cir. 1977).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

* Citations herein to pages of appendices are to each appendix of the Petition and will appear as follows: "App. —, p. —".

Questions Presented

1. When Petitioners have had a full and fair adjudication of issues in an action brought by the Securities and Exchange Commission, and been found, in that action, by both the District Court and Court of Appeals, to have intentionally violated Section 14(a) of the Securities Exchange Act of 1934, does the seventh amendment require that they be granted another trial, by a jury, to re-litigate the identical issues in the identical court?

2. Did the enlargement of the application of the doctrine of collateral estoppel, removing the requirement of mutuality, expressed by this Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), a case decided after the decision of the Court of Appeals for the Fifth Circuit in *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971), effectively overrule *Rachal* and thereby resolve any possible conflict between the Second and Fifth Circuits on the issue of whether Petitioners must here be granted a jury trial?

3. Are Petitioners entitled to a jury trial in this action, on issues already determined in an action brought by the Securities and Exchange Commission, when they failed to preserve whatever jury rights they might have had in this action, by:

(a) failing to seek a jury trial in the action brought by the Securities and Exchange Commission, and

(b) failing to seek a stay of the trial in that action pending a trial to a jury in this action?

Constitutional Provision and Federal Rules Involved

Rule 1 of the Federal Rules of Civil Procedure provides:

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

The pertinent provisions of the United States Constitution and the other pertinent Rules of the Federal Rules of Civil Procedure are set forth in the Petition at pp. 3 and 4.

Statement of the Case

This action was commenced in the United States District Court for the Southern District of New York on November 13, 1974, against Petitioners and twelve other defendants who were officers, directors and/or shareholders of Petitioner Parklane Hosiery Company, Inc. ("Parklane") as of the date of the merger described below. The action was certified, by Order dated May 2, 1975, as a class action on behalf of all Parklane shareholders on September 14, 1974, the record date in connection with said merger. The Complaint, as amended, (hereinafter the "Complaint") alleged violations of Sections 10(b), 14(a) and 20(a) of the Securities Exchange Act of 1934, as amended (the "1934 Act"), 15 U.S.C. §§ 78j(b), 78n(a) and 78t(a), certain rules promulgated thereunder and the common law.

The action is based upon a false and misleading proxy statement dated September 24, 1974 (the "Proxy Statement") which the Complaint alleges fraudulently caused

a merger (the "Merger") in which the public shareholders of Parklane were bought out of Parklane. As a result of the Merger, Parklane was merged with New PLHC Corp., a company incorporated solely to act as a corporation to merge with Parklane. Prior to the Merger, the individual defendants owned 71.6% of the issued and outstanding shares of Parklane. They transferred these shares to New PLHC Corp. immediately prior to the Merger and, at such time, their shares became its only asset. In full payment for their Parklane shares, the public shareholders were paid, in the Merger, \$2.00 per share cash, whereas the individual defendants received shares of New PLHC Corp. and the right to participate in its future business.

Plaintiff alleged in the Complaint that the Proxy Statement was false and misleading in that, *inter alia*:

- (a) it made statements as to various reasons why Parklane would be converted to a privately-owned company when, in fact, the true undisclosed reason for its conversion was to aid Petitioner Herbert N. Somekh ("Somekh") in meeting his personal financial obligations;
- (b) it made statements concerning the termination of negotiations with the Federal Reserve Board of New York ("FRB") with regard to Parklane's leasing of property located in New York City from the FRB when, in fact, the defendants failed to disclose the existence of on-going negotiations with the FRB concerning the cancellation of such leasehold rights which negotiations could have resulted in Parklane receiving substantial benefits; and
- (c) it made statements that Parklane had employed two appraisers to determine the fair value of Parklane stock, when in fact the defendants failed to disclose

in the Proxy Statement that the two appraisers were not provided with sufficient information to prepare and provide a true and complete valuation of such stock.

Respondent further alleged that the distribution of the Proxy Statement was part of a fraudulent scheme giving rise to liability to the Respondent and other members of the class under Section 10(b) and the common law.

In May, 1976, the Securities and Exchange Commission ("SEC") commenced an action in the Southern District of New York against Petitioners alleging that the Proxy Statement was false and misleading (the "SEC action"). After trial therein, the District Court, finding intentional violations by Petitioners of the 1934 Act, held:

- (a) "It is clear to me that the overriding purpose for the merger was to enable Somekh to repay his personal indebtedness. Had his finances been otherwise, the merger may never have occurred. There is not so much as a hint of Somekh's huge debts in the Proxy Statement. The non-disclosure [in the Proxy Statement] is clearly established." *Securities and Exchange Commission v. Parklane Hosiery Co., Inc.*, 422 F. Supp. 477, 482 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977).
- (b) "I find that the October 4 conference between Somekh and the authorized representative of the FRB falls within the common usage of the term 'negotiation' [footnote omitted]. Thus, the unamended proxy material was false when it stated that 'there are no negotiations at present'." *Id.*, 422 F. Supp. at 483.
- (c) "The failure to inform Thomson & McKinnon [one of the appraisers] of these facts and the failure to

disclose the defect in the appraisal in the Proxy Statement is beyond question." *Id.*, 422 F. Supp. at 484.

The District Court further held that these misstatements in, and omissions from, the Proxy Statement were material and intentional. *Id.*, 422 F. Supp. at 486-487.

On July 8, 1977, the Court of Appeals for the Second Circuit specifically affirmed each of these findings of the District Court in the SEC action. 558 F.2d at 1086-1087.

In the SEC action, Petitioners had a full and fair opportunity to, and did, litigate the accuracy of the Proxy Statement. Nowhere in the Petition or in their papers before the Court below or the District Court did Petitioners even hint that they did not receive a full and fair adjudication in the SEC action. After that adjudication, both the District Court and Court of Appeals found the Proxy Statement to be materially and intentionally misleading for the reasons alleged in the Complaint.

After the District Court decision in the SEC action, Respondent moved for partial summary judgment on liability based on the factual findings in the SEC action. The District Court denied Respondent's motion. App. E., p. 26(a). Respondent then moved, pursuant to 28 U.S.C. §1292(b) and Rule 5, Fed. R. App. P., for certification of a question for appeal. The District Court granted the motion and the Court below granted the petition for leave to appeal.

The Court below, relying on numerous decisions of this Court including, in particular, *Blonder-Tongue, supra*, and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), unanimously reversed the District Court's decision. In so deciding, the Court below found no constitutional require-

ment that "... a party who has had issues of fact determined against it after a full and fair opportunity to litigate them in a non-jury trial of an action against it may, in a different suit against it by another person, obtain a jury trial of the same issues of fact arising out of the same transaction." App. A, pp. 2a-3a.

On December 20, 1977, (a) the Court below denied Petitioners' motion for rehearing and (b) the Court of Appeals for the Second Circuit denied Petitioners' suggestion that the action be reheard *in banc*.

ARGUMENT

Petitioners, who have already been found to have intentionally violated the 1934 Act, are seeking here to relitigate the issues which have already been decided against them in the SEC action. Notwithstanding that decision, and after an opportunity for a full and fair judicial resolution of the issues upon which partial summary judgment was here sought, Petitioners contend that they are entitled to a second trial on those same issues, this time before a jury.

It is clear, based on the seventh amendment and numerous prior decisions of this Court, that Petitioners are not entitled to a second trial because the facts upon which Respondent seeks partial summary judgment have already been adjudicated, leaving nothing for a jury to decide. By removing the mutuality requirement in applying the doctrine of collateral estoppel, this Court, in *Blonder-Tongue, supra*, has precluded re-litigation of factual findings after a full and fair opportunity for their judicial resolution. Petitioners received that judicial resolution in the SEC action and cannot, therefore, re-litigate those findings in this action. To hold otherwise would not only be contrary to this Court's decision in *Blonder-Tongue* but would be

based, as was *Rachal*, on a completely erroneous analysis of *Beacon Theatres*.

Furthermore, acceptance of Petitioners' interpretation of the seventh amendment and the case law precedents, would, in the guise of preserving a non-existent jury right, allow a second trial, on the identical issues, to parties already found to have intentionally violated the 1934 Act. This would perforce lead to further congestion of the already over-crowded federal court calendars. Respondent does not contend that a jury trial right should be extinguished simply to clear up congested court dockets, but instead urges that a jury trial right should not be created to further overload those dockets.

Finally, Petitioners discuss the issue raised by the Court below in *dictum* (App. A, p. 14a), of their right, *vel non*, to a jury or an advisory jury in the trial of the SEC action. However, that question, regardless of its importance, is not before this Court. In any event, the record makes clear that Petitioners neither sought a jury or an advisory jury in the trial of the SEC action nor did they seek a stay of that action pending a determination of the instant action. It is respectfully submitted that by the failure of Petitioners to seek the relief in the SEC action, proposed by the Court below, they waived any jury trial rights which they may have had in this action. The question of jury trial rights of defendants against whom the SEC and private litigants have commenced suit should, if important enough to be heard at all by this Court, await an action in which the proper steps have been taken by a defendant to preserve its jury rights.

I.

Any Conflict Between the Second and Fifth Circuits on the Issue Here Presented Has Been Rendered Moot by This Court's Decision in *Blonder-Tongue* Which Effectively Overruled *Rachal*.

By its decision in *Blonder-Tongue*, *supra*, this Court, as admitted by Petitioners (Petition at p. 14) permitted the application of collateral estoppel in the absence of mutuality. The Court below stated:

As Justice White observed in *Blonder-Tongue*, *supra*, the fundamental question is "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue," 402 U.S.a [sic] 328, a question which the Court answered in the negative. App. A, p. 14a, fn.4.

The decision in *Blonder-Tongue* effectively overrules *Rachal* and makes clear that once factual issues have been fully and fairly litigated, the doctrine of collateral estoppel precludes their re-litigation in an action commenced by one who was not a party to the first action. The underlying reasoning is simple—the facts have been determined by a judicial resolution and are no longer in dispute. A new trial would be a meaningless act since there would be no factual issues for a jury to decide.

There can be no question that the judicial resolution in the SEC action was full—it consisted of a three-day trial and an appeal to the Court of Appeals. Nor can the fairness of the adjudication in the SEC action be questioned. In fact, Petitioners have never questioned the fullness and fairness of the adjudication in the SEC action. The reasoning of *Blonder-Tongue*, therefore, precludes affording Peti-

tioners a second trial on the issues already decided against them. Furthermore, to the extent that foreseeability of the possible use of collateral estoppel in this action is a factor in determining whether application of estoppel principles would be unjust, see *The Evergreens v. Nunan*, 141 F.2d 927, 929 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944), no unfairness exists because this action was begun prior to the commencement of the SEC action and Petitioners, being parties to two suits pending at the same time, were fully aware of the estoppel consequences.

Because there are no factual issues for jury determination in the instant case, it is readily distinguishable from the decision of this Court in *Dimick v. Schiedt*, 293 U.S. 474 (1935) relied upon by Petitioners. *Dimick* was an action brought to recover damages for a negligently caused personal injury. The jury returned a verdict in favor of plaintiff for the sum of \$500. Plaintiff moved for a new trial on the grounds that the verdict was contrary to the weight of the evidence, that it was a compromise verdict, and that the damages allowed were inadequate. The trial court ordered a new trial upon the last named ground, unless defendant consented to an increase of the damages to the sum of \$1500. Plaintiff's consent was neither required nor given. Defendant, however, consented to the increase and, in accordance with the order of the court, a denial of the motion for a new trial automatically followed. On plaintiff's appeal, the judgment was reversed, the court of appeals holding that the conditional order violated the seventh amendment in respect to the right of trial by jury.

In affirming the decision of the court of appeals in *Dimick*, this Court stated:

With, perhaps, some exceptions, *trial by jury* has always been, and still is generally regarded as the normal preferable *mode of disposing of issues of fact*

in civil cases at law . . . Maintenance of the *jury as a fact-finding body* is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Id.* at 485-486. (Emphasis added.)

A new jury trial was therefore ordered in *Dimick* so that factual issues upon which the claim at law was based could be decided by a jury. *Dimick* is completely inapplicable to the case at bar because, in Respondent's motion for partial summary judgment of liability, based on the factual findings in the SEC action, there are no issues for the jury as a "fact-finding body" to decide. The factual issues were decided in the SEC action, and *Blonder-Tongue* precludes their re-litigation here.

II.

The Decision Below Is Clearly Correct as it Properly Applies the Reasoning of *Beacon Theatres* and Its Progeny.

Even if this Court does not view *Blonder-Tongue* as resolving the conflict between the Second and Fifth Circuits, the decision of the Court below is clearly correct. The Court below properly rejected Petitioners' arguments which were primarily grounded on their erroneous reading of the decision of this Court in *Beacon Theatres* and its equally erroneous application by the Court of Appeals for the Fifth Circuit in *Rachal*.

Rachal completely misinterprets *Beacon Theatres*. In *Beacon Theatres*, this Court ordered that a legal counterclaim be tried by a jury, prior to the trial of an equitable claim by the Court, in an action in which both claims would

be resolved by the determination of common factual issues. It is respectfully submitted that in so deciding, this Court assumed that, if the equitable claim were adjudicated by the court first, collateral estoppel would preclude a subsequent jury determination of the issues decided by the court. As stated in Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 Harv. L. Rev. 442 (1971):

Beacon Theatres thus indicated that whenever principles of former adjudication or law of the case might preclude jury trial on an issue previously litigated before a judge in the same proceeding, the trial judge must, in the absence of exceptional circumstances, order the trial of issues within that proceeding to assure that foreclosure does not occur. But *Beacon Theatres* did not imply that principles of former adjudication should themselves be changed under the influence of the seventh amendment. *Rachal* takes exactly the opposite tack from *Beacon Theatres*, concluding that seventh amendment considerations do influence the application of these principles when reordering is impossible, as it was in *Rachal* because of the separateness of the two proceedings.

• • •

No procedural reforms—merger of law and equity, declaratory judgment, or anything else—can be said to have affected the equitable character of the relief sought by the SEC in the initial proceeding or to have given the defendants a right to a jury in that action. Instead, *Rachal* raises the wholly different question whether the seventh amendment requires re-litigation of an issue already decided adversely to the party who now asserts a jury trial right. Is there really an anomaly, as the Fifth Circuit seemed to think, in con-

cluding that a jury must be given on an issue not yet adjudicated, but that an issue need not be *re-litigated* once it has been decided by the court sitting alone? *Id.* at 446-447. (Emphasis in original)

Moreover, the authors claim that *Rachal's* reliance on other Supreme Court decisions, *i.e.*, *Dairy Queen, Inc., v. Wood*, 369 U.S. 469 (1962), and *Scott v. Neely*, 140 U.S. 106 (1891),* is equally misplaced. Shapiro and Coquillette, 85 Harv. L. Rev. at 447-448.

In short, *Beacon Theatres* states that where parties join legal and equitable claims arising from the same transaction, the legal claim must be adjudicated first by a jury to preserve the jury right as to that claim. As the Court below correctly stated:

Thus *Beacon Theatres* simply asserts that where parties join legal and equitable claims arising out of the same transaction, the court must schedule the sequence of trial to protect a party's constitutional right to a jury trial. However, we do not view the decision as compelling the result reached in *Rachal*. If anything, *Beacon Theatres* implicitly confirms the long-accepted principle that a non-jury adjudication of issues asserted in an equitable claim will collaterally estop a later jury trial of the same issues presented by the same party in a legal claim. Had it not been for that basic assumption the Supreme Court would not have been concerned about the order in which the legal and equitable claims were to be tried, since the defendant would then have been guaranteed a jury trial of the counterclaim regardless of the outcome of the equitable claim. App. A, pp. 11a-12a.

* *Scott v. Neely*, *supra*, although not directly relied upon by the *Rachal* Court, was cited within the quotations from *Beacon Theatres* which were relied upon by *Rachal*.

And as recently stated by Judge Friendly, writing for a unanimous Court in *SEC v. Commonwealth Chemical Securities, Inc.*, CCH Fed. Sec. L. Rep. [Current Transfer Binder] ¶96,351 at 93, 194 (2d Cir. 1978):

[T]he holding in *Beacon Theatres v. Westover*, [citation omitted], the *fons et origo* of modern concern over the interplay between the right to jury trial suits at common law and the lack of such a right in suits in equity, assumed that there would be no jury trial on the plaintiff's claim for an injunction and a declaratory judgment and that a judgment for the plaintiff on these claims would work as a collateral estoppel on the defendant's counterclaim for damages.

Thus, *Beacon Theatres* makes clear that the seventh amendment does not give Petitioners the right to a jury trial on factual issues already determined against them. To argue that the seventh amendment precludes the application of the doctrine of collateral estoppel to the instant case, stands *Beacon Theatres* on its head. The decision of the Court of Appeals for the Fifth Circuit in *Rachal* is so improperly reasoned that it should not disturb the ruling of the Court below.

III.

There Is No Important Question of Law Presented.

A. Petitioners Have Waived Whatever Right to Jury Trial They May Have Had.

Petitioners have raised the question, referred to in *dictum* by the Court below (App. A, at p. 14a) as to the right of a defendant to a jury trial in an action in which the SEC seeks injunctive relief. Whatever the import of that question, it is not the question before this Court. This

Court is not being asked to determine whether a party is entitled to a jury in an action in which the relief sought is equitable; the question is simply whether once facts in issue have been judicially determined, is the party against whom they have been determined entitled to re-litigate them. This Court replied in the negative in *Blonder-Tongue*, as did the Court below which relied on *Blonder-Tongue* and *Beacon Theatres* and its progeny.

Furthermore, as the Court below stated, by failing to seek a jury or an advisory jury in the SEC action, and by failing to seek a stay of the trial in that action pending a trial in this action, Petitioners waived whatever jury rights they may have had in this action. They did so by failing to take the proper steps to preserve any such rights by their conduct in the SEC action. Should this Court wish to address the question of jury trial rights of defendants situated in a position similar to that of Petitioners, it is respectfully submitted that such question should be resolved in an action in which the defendants have taken the necessary steps to protect their rights to trial by jury.

B. Petitioners' Contention That All Claims at Law Must Be Tried by a Jury Is Erroneous.

What Petitioners are apparently claiming is that the seventh amendment requires that all claims at law reach, and be decided by, a jury. Obviously, there is no such requirement. It is well established, for example, that a court has full constitutional power to withdraw a case from a jury under Rule 50(a) and (b) of the Federal Rules of Civil Procedure and that such action does not violate a party's seventh amendment rights. See, *e.g.*, Wright & Miller, *Federal Practice & Procedure*: Civil §2522. The instant motion is simply one which has been withdrawn from a jury as there are no facts for it to decide. As the

Court of Appeals for the Second Circuit stated in a case in which a directed verdict would have been required even if there had been a jury trial: "There is no constitutional right to have twelve men sit idle and functionless in a jury-box." *United States v. 243.22 Acres of Land*, 129 F.2d 678, 684 (2d Cir. 1942), *cert. denied*, 317 U.S. 698 (1943). That would be precisely the role of a jury in the decision of the instant motion for partial summary judgment.

To grant Petitioners a jury trial would, as the Court below noted:

. . . violate basic principles of fairness, finality, certainty, economy in utilization of judicial resources, avoidance of possibly inconsistent results, and achievement of the just, speedy and inexpensive determination of every action, Rule 1, F.R. Civ. P. App. A, p. 14a. [Footnotes omitted].

There is no reason to permit Petitioners to again litigate the question of whether they intentionally violated the 1934 Act—an issue which has already been decided against them in the United States District Court for the Southern District of New York and the Court of Appeals for the Second Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and
HERBERT N. SOMEKH,

Petitioners,

against

LEO M. SHORE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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— 0 —

REPLY BRIEF FOR PETITIONERS

Respondent, in an attempt to defeat certiorari, confirms that certiorari should be granted. Respondent's brief (pp. 11-14) not only concedes but emphasizes the conflict between the Fifth and Second Circuits on the important constitutional question whether, in the absence of mutuality, the right to trial by jury may be destroyed through collateral estoppel. On that question, Respondent argues that the Second Circuit, in its decision below, was clearly correct and that the Fifth Circuit, in *Rachal v. Hill*, 435 F.2d 59 (1970), *cert. denied*, 403 U.S. 904 (1971), was clearly wrong. It remains for this Court to decide the question and resolve the conflict.

I

Respondent's brief (pp. 9-11) mistakenly relies upon *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) to contend that a post-1791 change in the common law doctrine of collateral estoppel has destroyed the constitutional jury trial right. In so doing, Respondent has ignored the fact that *Blonder-Tongue* did not even present a question of the loss of a jury trial right. Contrary to the inflexible rule which Respondent has attributed to *Blonder-Tongue*, this Court, in *Blonder-Tongue*, expressly stated that, in the absence of mutuality, collateral estoppel could not be applied pursuant to an "automatic formula". 402 U.S. at 334.

This same principle was stated and applied by the Fifth Circuit in *Rachal* which held that, in the absence of mutuality, collateral estoppel could not be applied to destroy a jury trial right. Petition, pp. 13-15. This Court has not held otherwise. *Blonder-Tongue*, contrary to Respondent's contention, did not "effectively" overrule *Rachal* in any respect. *Blonder-Tongue* did not even suggest that, in the absence of mutuality, collateral estoppel could destroy a constitutional jury trial right. There is thus no inconsistency between *Blonder-Tongue* and *Rachal*.

II

Respondent's brief (p. 9) rests upon the demonstrably incorrect premise that a determination of factual issues in one action automatically renders them undisputed in another action. It thereby begs the unresolved question presented here as to whether collateral estoppel is or is not applicable. Where collateral estoppel is not applicable, issues determined in an earlier action remain in dispute in a second action.

Respondent's brief (pp. 10-11) also employs its question-begging premise to avoid recognition of the undisputed constitutional principle enunciated in *Dimick v. Schiedt*, 293 U.S. 474 (1935). On the basis of its erroneous assumption, Respondent contends that *Dimick* and the instant case are distinguishable. As to *Dimick*, Respondent argues that there were issues for jury determination; as to the instant case, Respondent simply relies upon an assumption that there are no such issues. To the contrary, if the constitutional jury trial right here is upheld against a claim of collateral estoppel, then here, as in *Dimick*, there are issues for jury determination. Respondent's claimed distinction is no distinction at all.

Dimick was decided upon the constitutional principle, ignored by Respondent, that a post-1791 change in the common law cannot serve to destroy the jury trial right which the Seventh Amendment preserved as that right existed in 1791. That principle is equally applicable here to preserve Petitioners' jury trial right, notwithstanding the relaxation of the requirement of mutuality.

III

Respondent's brief (pp. 11-14) again underscores the conflict between the decisions of the Fifth and Second Circuits in contending that one, but not the other, correctly read and applied *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). Though Respondent's brief claims that the Court below properly applied the reasoning of *Beacon Theatres* "and its progeny", that brief completely overlooks this Court's subsequent decision in *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160 (1963), *rev'g mem.*, 308 F.2d 875 (10th Cir. 1962).

As has been seen (Petition, pp. 10-12), *Beacon Theatres* and *Meeker* teach (a) that as between the constitutional jury trial right and the common law principle of collateral estoppel, the jury trial right is supreme and, accordingly, (b) that the Fifth Circuit correctly upheld the jury trial right in *Rachal* after there had been a full and fair trial to the court alone in an earlier-tried action in which the jury trial right did not exist.

IV

Respondent now for the first time claims that Petitioners waived their jury trial right in this action by not requesting a jury or an advisory jury in the earlier-tried SEC action (Resp. br. pp. 14-15). Having made such a claim, that brief (pp. 8, 15) is patently inconsistent in asserting that the question whether there was such a waiver is not before this Court. In any event, the claimed waiver is devoid of merit.

In the circumstances here, the claimed waiver could not have occurred. The right to a jury trial did not exist in the SEC action; there was no jury trial right to request; the use of an advisory jury could not satisfy the Seventh Amendment jury trial right; and, accordingly, the absence of a request for a jury or an advisory jury in the SEC action could not constitute a waiver of the jury trial right in this action. Petition, pp. 25-27.

Respondent does not contend, as the Court below had suggested, that the jury trial right in this action was waived because this action was not expedited and tried prior to the trial of the SEC action. As has been seen, this action could not have been expedited and tried before the trial of the SEC action. Petition, pp. 22-23. However,

unlike the Court below, Respondent's brief (pp. 8, 15) contends, for the first time, that Petitioners waived their jury trial right in this action by not seeking a stay of the SEC action. This contention is also devoid of merit. Respondent's brief is completely silent as to the authorities which uniformly establish that such a stay of an SEC action is unavailable and that a request therefor would have been futile. Petition pp. 23-25.

Clearly, there was no waiver of Petitioners' jury trial right. The constitutional question arising from the conflict between the Fifth and Second Circuits is squarely presented. The question, its importance and the need for its resolution are clear.

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COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 565 F.2d 815 (1977) and is set forth as Appendix A, pages 1a-19a, annexed to the petition for certiorari.* It reversed the order of the United States District Court for the Southern District of New York which, in upholding Petitioners' constitutional jury trial right against a claim of collateral estoppel, had denied Respondent's motion for partial summary judgment relating to the question of liability. The opinion of the District Court was not officially reported. It appears at App. E, p. 26a.

* Citation herein to pages of each of the five appendices annexed to the petition for certiorari will appear as follows: "App. , p. ".

Jurisdiction of this Court

The judgment of the Court of Appeals sought to be reviewed was entered November 1, 1977. App. B, p. 20a. The petition for rehearing and rehearing en banc was denied by orders dated December 20, 1977. App. C, p. 22a; App. D, p. 24a. The petition for certiorari was filed in this Court on March 17, 1978 and certiorari was allowed on May 1, 1978 (A 62a).^{*} The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision and Federal Rules Involved

The Seventh Amendment to the United States Constitution provides:

“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”

Rules 39(b) and (c) of the Federal Rules of Civil Procedure provide:

“(b) *By the Court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

^{*} Citation herein to pages of the Appendix filed herewith will appear as follows: “(A)”.

“(c) *Advisory Jury and Trial by Consent.* In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.”

Questions Presented

1. Did the Court below err in denying Petitioners their Seventh Amendment right to a jury trial of certain issues in this action on the basis of findings made in an earlier-tried non-jury action in which the jury trial right did not exist and to which Respondent was not a party?

2. Can the constitutional jury trial right, preserved by the Seventh Amendment as that right existed in 1791, be destroyed by a post-1791 change in the common law doctrine of collateral estoppel?

3. Does the decision below conflict with the decision of this Court in *Dimick v. Schiedt*, 293 U.S. 474 (1935)?

4. Did the Court below err in concluding that Petitioners lost their constitutional jury trial right in this action as to those issues determined in a Securities and Exchange Commission (“SEC”) enforcement action

(a) by not requesting a jury or an advisory jury in the SEC action, notwithstanding the fact that there never had been a right to a jury trial in the SEC action and Respondent had not been a party thereto, or

(b) by not seeking to have this action tried prior to the SEC action, notwithstanding the fact that this action could not have been made ready for, and brought to, trial before the trial of the SEC action?

Statement of the Case

This action was commenced on November 13, 1974 by Respondent, a former shareholder of Petitioner Parklane Hosiery Company, Inc. ("Parklane"), against the two Petitioners and 12 other defendants. The complaint (A 4a) alleged violations of §§ 10(b), 14(a) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. §§ 78j(b), 78n(a) and 78t(a), certain rules promulgated thereunder and the common law. Respondent demanded a trial by jury (A 4a).

The action followed an October 1974 merger, pursuant to the laws of the State of New York, whereby Parklane was returned to its former status as a private company. The complaint, seeking damages, challenged the validity of the merger and alleged that the related proxy statement dated September 24, 1974 (the "Proxy Statement") was deficient in a number of respects. The answer denied all of the material allegations of the complaint (A 15a). The action was certified as a class action and the notice thereof informed the class that "[t]he complaint seeks money damages for the members of the class" (A 20a, 21a).

While this action was still in its pre-trial stage, the SEC, on May 5, 1976, commenced an enforcement action in the United States District Court for the Southern District of New York against the two Petitioners (the "SEC action"). The SEC simultaneously moved, by order to show cause, for the same injunctive and ancillary relief sought in its

complaint. The SEC did not challenge the validity of the Parklane merger. Rather, the SEC's complaint and its motion were limited to a claim that the Proxy Statement was deficient in three respects.*

On May 20, 1976, Respondent moved (A 24a) to amend his complaint to include allegations of the same violations alleged in the SEC's complaint and to add a claim for rescission. While Respondent's motion to amend the complaint was pending, the trial of the SEC action was ordered to commence on June 2, 1976. The trial, to the Court alone, was concluded on June 7, 1976; decision was reserved.

At the time the SEC action was commenced and tried, this action was not ready for trial. Pre-trial discovery was far from complete. While there were then outstanding notices by both sides to take certain depositions, the only discovery in this action had been the production of certain documents by Parklane.

On September 3, 1976, subsequent to the conclusion of the trial of the SEC action, Respondent's motion to amend the complaint was granted (A 24a). The amended complaint, served October 1, 1976, repeated Respondent's jury demand (A 25a). The answers denied all of the material allegations of the amended complaint (A 38a, 45a).

* The SEC action was entitled *Securities and Exchange Commission v. Parklane Hosiery Co., Inc., Herbert N. Somekh*, 76 Civ. 2024 (KTD). The SEC's complaint and motion were based upon § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); §§ 10(b), 13(a) and 14(a) of the 1934 Act, 15 U.S.C. §§ 78j(b), 78m(a) and 78n(a); and certain rules promulgated thereunder.

At the time the SEC action was commenced, the instant action was before District Judge Wyatt. The SEC action was assigned to District Judge Duffy. As the Court below was informed in response to its inquiry upon oral argument, Petitioners had applied in writing to Judge Duffy for reassignment of the SEC action to Judge Wyatt pursuant to the assignment rules of the District Court applicable to related cases. Petitioners' application was denied.

On November 9, 1976, the District Court (Duffy, J.) entered an Opinion and Order in the SEC action in which it found that the Proxy Statement violated § 14(a) of the 1934 Act and Rule 14a-9 thereunder in the three respects claimed by the SEC. *Securities and Exchange Commission v. Parklane Hosiery Co., Inc.*, 422 F. Supp. 477, *aff'd*, 558 F.2d 1083 (2d Cir. 1977).^{*} Thereupon, Respondent, on November 24, 1976, moved for partial summary judgment against Petitioners (A 53a).

Respondent's motion was based upon a contention that Petitioners were collaterally estopped in this action by the findings of fact made in the SEC action. Petitioners, contending they were not so estopped, opposed the motion on the ground (a) that, in the SEC action, they had had no right to a jury trial; (b) that, in this action, they do have a right to the jury trial which Respondent himself had demanded; and (c) that Respondent, who was not a party to the SEC action, could not, through collateral estoppel, deprive Petitioners of their jury trial right in this action.

The District Court (Wyatt, J.) denied Respondent's summary judgment motion (App. E, p. 26a), relying upon *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971), a case squarely in point. Respondent then moved, pursuant to 28 U.S.C. § 1292(b) and Rule 5, Fed. R.App.P., for certification of a question for appeal. The District Court granted the motion (A 55a) and the Court below granted the petition for leave to appeal (A 57a).

^{*} The District Court denied all of the relief requested by the SEC except to the extent that Parklane was directed to file, and Petitioner Somekh, its president, to cause to be filed, amendments to Parklane's prior filings with the SEC to reflect the three deficiencies found in the Proxy Statement. 422 F. Supp. at 487.

The question certified was as follows:

"Whether the Court's findings of fact in a prior action commenced by the Securities and Exchange Commission ('SEC') can, by the doctrine of collateral estoppel, be applied to a subsequent action by a different plaintiff, seeking legal and equitable relief, based on the same transactions as was the action commenced by the SEC, when (a) there was no right to a jury trial in that action and (b) the Court found that the subject transaction was effected by means of materially misleading statements and omissions." (A 55a-56a)

In its November 1, 1977 opinion, the Court below reversed the District Court. Expressly stating that it disagreed with the Fifth Circuit's decision in *Rachal, supra*, (App. A, p. 18a), the Court below held that Petitioners' jury trial right in this action as to issues of fact determined in the SEC action was extinguished, through collateral estoppel, on the ground that there had been a full and fair non-jury trial in the SEC action.

The Court below also concluded that the jury trial right in this action as to those issues determined in the SEC action had been waived, though Respondent had not claimed, and the District Court had not found, any such waiver. The Court below stated that the jury trial right had been waived because Petitioners had not (a) sought to expedite the trial of this action or (b) requested the District Court to try the SEC action to a jury or before an advisory jury pursuant to Rule 39(b) or (c), Fed.R.Civ.P. App. A, p. 14a.

This Court allowed certiorari by order filed on May 1, 1978 (A 62a).

Summary of Argument

The decision below represents the first time that the right of trial by jury, as it existed in 1791 and was preserved by the Seventh Amendment, has been extinguished by a post-1791 change in the common law. The Court below held that Petitioners were collaterally estopped from trying to a jury in this action those issues which had been determined in the earlier-tried SEC action in which a jury trial right never existed and to which Respondent had not been a party.

I. The decision below denied Petitioners their constitutional jury trial right on the basis of the relatively recent judicial relaxation of the requirement of mutuality of estoppel.* It is, therefore, in conflict with the long-established principle, enunciated by this Court in *Dimick v. Schiedt*, *supra*, that a post-1791 change in the common law cannot be invoked to extinguish the Seventh Amendment jury trial right as that right existed in 1791.

II. In the absence of mutuality, the application of collateral estoppel is not automatic, but depends upon considerations of justice and equity. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, *supra*, 402 U.S. at 333-334. Where there is no mutuality, collateral estoppel may not be applied to extinguish a Seventh Amendment jury trial right. *Rachal v. Hill*, *supra*.

The Fifth Circuit, in *Rachal*, in circumstances indistinguishable from those here, correctly held that defendants in

* Mutuality of estoppel means that "unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as determinative of an issue in the second action." *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320-321 (1971).

a private action for damages under the federal securities laws could not be deprived of their jury trial right on the basis of findings made in an earlier-tried SEC enforcement action. The Fifth Circuit perceived the injustice of depriving the defendants in that case of the jury trial right they would have had, had the *Rachal* plaintiff been a party to the SEC action and therein presented his claim for damages. But for the decision below, *Rachal* has been consistently followed.*

III. Not only is the decision below admittedly in conflict with *Rachal*, but such conflict is based on diametrically opposite interpretations of this Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). In assuming that a full and fair prior trial to a court alone was sufficient to extinguish a jury trial right in a subsequent action, the Court below misconstrued *Beacon Theatres* and this Court's subsequent decision in *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160 (1963), *rev'g mem.*, 308 F.2d 875 (10th Cir. 1962).

IV. The Court below erred in holding that Petitioners waived their jury trial right in this action by not having it expedited and tried prior to the trial of the related SEC action. At the time the SEC action was commenced and tried, the procedural posture of the two cases did not permit this action to be readied for trial and tried first. The Court below also ignored the well-established policy that the trial

* *Securities and Exchange Commission v. Standard Life Corp.*, 413 F. Supp. 84 (W.D. Okla. 1976); *McCook v. Standard Oil Corp.*, 393 F. Supp. 256 (C.D. Cal. 1975); *Cannon v. Texas Gulf Sulphur Co.*, 323 F. Supp. 990 (S.D.N.Y. 1971). See also *Allegheny Airlines, Inc. v. United States*, 504 F.2d 104, 111 n.7 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.*, 453 F.2d 1177, 1184 (3d Cir. 1972); *Stewart v. United Australian Oil, Inc.*, [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,019 (S.D.N.Y. 1975).

of an SEC enforcement action may not be delayed by private litigation.

V. The Court below erred in holding that Petitioners waived their jury trial right in this action by not requesting a jury trial in the SEC action. The absence of such a request could not result in any waiver. Such a request would have been groundless and futile. The courts, including the Court below, have uniformly held that the jury trial right does not exist in an SEC enforcement action.

VI. Finally, the Court below erred in holding that Petitioners waived their jury trial right in this action by not requesting the SEC action to be tried before an advisory jury. The absence of such a request could not result in any waiver. An advisory jury could not have satisfied Petitioners' Seventh Amendment jury trial right.

ARGUMENT

I

The Court below extinguished Petitioners' jury trial right in derogation of the Seventh Amendment's preservation of that right as it existed in 1791 and contrary to this Court's interpretation of that Amendment.

The Seventh Amendment, adopted in 1791, provides that the jury trial right "shall be preserved." Departing from that mandate, the Court below relied upon the relatively recent judicial relaxation of the requirement of mutuality to extinguish Petitioners' jury trial right through collateral estoppel. In so doing, the Second Circuit reached an unprecedented result which cannot be reconciled with the Seventh Amendment and this Court's interpretation of it.

A. The scope of the Seventh Amendment must be determined by reference to the rules of the common law in 1791.

The decision below is at odds with the teachings of this Court and the test it formulated and repeatedly applied in resolving Seventh Amendment questions. *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Cartis v. Loether*, 415 U.S. 189 (1974); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935); *Dimick v. Schiedt*, *supra*. In *Dimick*, *supra*, this Court wrote:

"In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." 293 U.S. at 476.

The application of that test was illustrated in *Pernell*, *supra*, where the jury trial right was upheld in an eviction action brought under a District of Columbia statute. There, this Court wrote:

"Had Southall Realty leased a home in London in 1791 instead of one in the District of Columbia in 1971, it no doubt would have used ejectment to seek to remove its allegedly defaulting tenant. And, as all parties here concede, questions of fact arising in an ejectment action were resolved by a jury." 416 U.S. at 373-374. (footnote omitted)

Notwithstanding the fact that the long-established historical test enunciated in *Dimick* has been consistently followed by this Court, the Court below mistakenly believed that the historical test "has been somewhat weakened by recent pronouncements," App. A, p. 16a, and stated that, in any event, it could not successfully make such an historical inquiry. App. A, p. 17a. Thus, in respect of actions for

damages under the federal securities laws, the Court below wrote that it could not "by reference to 1791 precedents, determine what jury trial and collateral estoppel rules would have been developed or applied by common law courts of that period." App. A, p. 17a. To the contrary, a determination can readily be made as to the rules applicable in the circumstances here.

Not only has this Court stated that it is "'a matter too obvious to be doubted'" that a Seventh Amendment jury trial right exists in respect of claims for damages brought under post-1791 statutes, *Curtis v. Loether, supra*, 415 U.S. at 193; *Pernell v. Southall Realty, supra*; see *Schine v. Schine*, [1969-70 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,552 (S.D.N.Y. 1970); *Richland v. Crandall*, 259 F. Supp. 274 (S.D.N.Y. 1966), but the decisions of this Court demonstrate that in 1791 where, as here, there was no mutuality, collateral estoppel could not have been invoked. *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912); *Brooklyn City and Newtown R.R. Co. v. National Bank of the Republic of N.Y.*, 102 U.S. 14 (1880); see *Mutual Benefit Life Insurance Co. v. Tisdale*, 91 U.S. 238 (1876); *Barr v. Gratz's Heirs*, 17 U.S. 213 (1819). Hence, in 1791, collateral estoppel could not have been invoked—as it was here—to extinguish a jury trial right.

It is thus apparent that the Court below had no basis for applying collateral estoppel to extinguish Petitioners' jury trial right. Indeed, the error of the Court below is also seen in its acknowledgement of the "absence of any 1791 authority for extension of the equitable doctrine of collateral estoppel to the present case." App. A, p. 18a.*

* While the Court below noted that the 1791 law courts "respect[ed] decrees and findings in equity" (App. A, p. 18a), it overlooked the fact, relevant here, that in the absence of mutuality those courts refused to give such decrees and findings any estoppel effect.

To reach its unprecedented result, the Court below speculated that the 1791 courts might "perhaps" have created an exception to the mutuality requirement simply because it was the government, here the SEC, which had obtained a prior judgment. App. A, p. 17a. There was no basis for such speculation. No such exception was recognized or created by the 1791 courts. See *Mutual Benefit Life Insurance Co. v. Tisdale, supra*.

In *Mutual Benefit*, this Court illustrated the principle that a 1791 private litigant, who was a stranger to an earlier-trying action brought by the government, could not invoke the findings made in that action through estoppel in a private action. As this Court wrote:

"If an indictment for an assault and battery by A upon B is prosecuted to a trial and conviction, the record is conclusive evidence in favor of A upon a subsequent indictment for the same offense; but, if B sues A for the same assault and battery, it cannot be doubted that it would be incompetent to introduce that record as evidence of the offense. For this purpose, it is *inter alios acta*. B was no party to that proceeding. In theory of law he was not responsible for it, nor capable of being benefitted by it." 91 U.S. at 244.

Similarly, in the very article relied upon by the Court below (App. A, p. 18a), the authors, referring to the state of the law in 1791 in relation to *Rachal v. Hill*, wrote:

"[L]imitations on the doctrine of collateral estoppel—in particular the doctrine of mutuality—would have made it impossible for [plaintiff] to deprive [defendants] of a jury on the issue of liability in an analogous proceeding in 1791 . . ." Shapiro and

Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV.L.REV. 442, 454 (1971).

In short, since, in the circumstances here, collateral estoppel could not have been applied in 1791, it cannot be invoked to extinguish Petitioners' jury trial right.

B. A post-1791 change in a common law doctrine cannot diminish a Seventh Amendment jury trial right.

The fact, noted by the Court below (App. A, p. 8a), that relatively recently the common law requirement of mutuality of estoppel has been relaxed in some cases cannot affect, let alone extinguish, Petitioners' right to a jury trial here. See *Dimick v. Schiedt*, *supra*. None of those cases involved a question of the jury trial right. In no instance had the jury trial right been denied through any relaxation of the mutuality requirement.*

Indeed, this Court, contrary to the unprecedented result reached by the Court below, had made it crystal clear that the constitutionally preserved right to a jury trial is supreme and cannot be lost through a post-1791 change in a common law doctrine. Thus, in *Dimick*, this Court wrote:

"It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The

* Collateral estoppel could be applied as to a legal issue in the absence of mutuality only where, unlike the case here, the constitutional right to trial by jury has been satisfied by an opportunity to try that issue to a jury in a prior action. See, e.g., *United States v. United Air Lines, Inc.*, 216 F. Supp. 709, 729 (E.D. Wash. 1962), *aff'd in part, modified in part on other grounds sub nom. United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 404 (9th Cir. 1964).

common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. *Funk v. United States*, 290 U.S. 371. But here we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution." 293 U.S. at 487.

In denying Petitioners the benefit of the constitutional principle enunciated in *Dimick*, the Court below relied upon a demonstrably irrelevant difference between the claim asserted in *Dimick*—a personal injury case—and the claim here. App. A, pp. 16a-17a. However, since here, as in *Dimick*, the constitutional jury trial right exists, the fact that the claims asserted were different cannot impair the applicability in each case of the constitutional principle enunciated in *Dimick*.

C. The Court below erred in believing that the historical test formulated by this Court for determining the scope of the Seventh Amendment has been "somewhat weakened."

Apparently misapprehending *Dimick* and subsequent decisions of this Court which also have held that the Seventh Amendment jury trial right, as it existed in 1791, "shall be preserved", e.g., *Pernell v. Southall Realty*, *supra*; *Curtis v. Loether*, *supra*, the Court below apparently thought that *Ross v. Bernhard*, 396 U.S. 531 (1970), "somewhat weakened" that requirement and could justify its denial of the jury trial right as it existed in 1791. App. A, pp. 15a-16a.

It is respectfully submitted, however, that *Ross*, *supra*, did not in any respect "weaken" the requirement of the historical inquiry. Rather, *Ross* simply stated that the historical inquiry happened to be the "most difficult" to

apply among three factors bearing upon the question whether a particular issue was " 'legal' " in nature. As this Court, in *Ross*, wrote:

"Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply." 396 U.S. at 538 n.10.

It is one thing to say, as in *Ross*, that the "required" historical inquiry is difficult; it is an entirely different matter to say, as the Court below did, that because a principle is difficult to apply the principle has been "somewhat weakened". *Ross* simply stands for the proposition that an enlargement of the jury trial right beyond its 1791 boundaries is consistent with the Seventh Amendment.*

Nor was the requirement of the historical inquiry weakened by *Bloom v. Illinois*, 391 U.S. 194 (1968), as the Court below thought. App. A, p. 16a. *Bloom* involved the Sixth Amendment jury trial right and its expansion to criminal contempt proceedings to an extent which had been unknown at common law. On the basis of an historical inquiry, *Bloom*, as did *Ross*, recognized that there is no constitutional barrier to the expansion of the right to trial by jury. Contrary to the mistaken belief of the Court below, in no respect did either *Ross* or *Bloom* suggest that the historical inquiry need not be made or that the Seventh Amendment jury trial right as it existed in 1791 could thereafter be curtailed.

Accordingly, it is respectfully submitted that the unprecedented curtailment of the jury trial right by the Court below constitutes a violation of the Seventh Amendment mandate that the jury trial right "shall be preserved" and an unwarranted deprivation of Petitioners' jury trial right.

* In enlarging the jury trial right, this Court, in *Ross*, held there was a jury trial right in a stockholders' derivative suit for damages, though such actions were traditionally cognizable only in equity and, consequently, had not been triable to a jury as of right.

II

While in the absence of mutuality collateral estoppel may be applied in some circumstances, it may not be applied to extinguish the jury trial right.

The Fifth Circuit in *Rachal, supra*, and the Second Circuit in this case, recognized that the requirement of mutuality of estoppel has recently been relaxed. They are in conflict, however, as to whether, in the absence of mutuality, a constitutional jury trial right may be destroyed through collateral estoppel. The Court below believed that as long as there had been a full and fair trial to a court alone in an action in which the jury trial right never existed, a stranger to that action could invoke collateral estoppel to destroy the jury trial right in a second action. The Fifth Circuit, to the contrary, had held that in such circumstances collateral estoppel could not be invoked and that preservation of the jury trial right was required.

According to the Fifth Circuit, the fact that there had been a full and fair trial is not enough to permit the application of collateral estoppel in the absence of mutuality. The Fifth Circuit, unlike the Second Circuit, held that it was also necessary to consider whether the application of collateral estoppel would result in an injustice to the party against whom it is asserted. Thus, in *Rachal*, the Fifth Circuit wrote:

"While the requirement of mutuality need no longer be met, the doctrine of collateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and that application of the doctrine will not result in an injustice to the party against whom it is

asserted under the particular circumstances of the case." 435 F.2d at 62. (citations omitted)

The same standards had been earlier stated by the Third Circuit in *Bruszewski v. United States*, 181 F.2d 419, 421, cert. denied, 340 U.S. 865 (1950). They were confirmed by this Court in *Blonder-Tongue*, supra.

Blonder-Tongue represented the first time this Court permitted the application of collateral estoppel in the absence of mutuality. There, in permitting collateral estoppel to be applied defensively, this Court expressly stated that the question of the offensive use of collateral estoppel—the question presented here—was not before it. 402 U.S. at 330. *Blonder-Tongue* also noted that the authorities have been more willing to permit the defensive, rather than the offensive, use of collateral estoppel. 402 U.S. at 329-330.

Even when asserted defensively, *Blonder-Tongue* taught that collateral estoppel may not be applied pursuant to an "automatic formula," but depended upon considerations of "justice and equity". 402 U.S. at 334. This Court wrote:

"But as so often is the case, no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial courts' sense of justice and equity." 402 U.S. at 333-334.*

Though the Court below, in applying collateral estoppel to extinguish the jury trial right, indicated reliance upon *Blonder-Tongue* (App. A, p. 8a), it overlooked the sig-

* Similarly, in *Bruszewski*, supra, to which *Blonder-Tongue* accorded precedential value, 402 U.S. at 324-325, the Third Circuit cautioned that when "some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case," collateral estoppel, in the absence of mutuality, may not be applied. 181 F.2d at 421.

nificant fact that *Blonder-Tongue* had no occasion to consider whether, and did not suggest that, collateral estoppel would apply where, as here, a jury trial right was at stake. In this regard, *Beacon Theatres* left no doubt that where the exercise of discretion might affect the jury trial right, a court must, wherever possible, preserve that constitutional right:

"Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." 359 U.S. at 510. (footnote omitted)*

That same principle was followed by the Fifth Circuit in *Rachal*, but disregarded by the Court below. The Fifth Circuit perceived the injustice of depriving the defendants in that case of the jury trial right they would have had, had the *Rachal* plaintiff been a party to the prior SEC enforcement action and had therein presented his claim for damages. 435 F.2d at 64. See *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.*, supra, 453 F.2d at 1183-84; see also *Allegheny Airlines, Inc. v. United States*, supra, 504 F.2d at 111 n.7. The Fifth Circuit, in language apposite here, wrote:

"In light of the great respect afforded in *Beacon Theatres*, supra, and its progeny, for a litigant's

* This principle is consistent with the strong federal policy favoring the jury trial right. See *Simler v. Conner*, 372 U.S. 221 (1953); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, rehearing denied, 357 U.S. 933 (1958). In *Byrd*, this Court, in a diversity action, ordered a jury trial of an issue which, had the action been tried in the state court, would have been determined by the court alone. While recognizing that as a result of its holding the litigation could come out one way in the federal court and another way in the state court and acknowledging the policy against such a result, this Court reached its decision on the ground that the federal policy favoring jury trials was the paramount consideration. 356 U.S. at 537-39.

right to have legal claims tried first before a jury in an action where legal and equitable claims are joined, it would be anomalous to hold that the appellants have lost their right to a trial by jury on the issue of whether they are liable to respond in damages for violations of the security laws because of a prior adverse determination by the district court of the same issue in an action in which their present adversary was not a party and which arose in a different context from the present action. *Beacon Theatres*, supra, makes it clear that had Hill been a party plaintiff in the S.E.C. injunction action and there presented his claim for damages, the appellants would have received a jury trial on the issue of liability. It hardly makes sense that Hill can now assume a position superior to that to which he would have been entitled if he had been a party to the prior action. Accordingly, we hold that the application of the doctrine of collateral estoppel was not appropriate in view of the particular circumstances presented by this case and that the district court erred in granting summary judgment on the issue of liability." 435 F.2d at 64.

Similarly, in *McCook v. Standard Oil Corp.*, supra, the Court balanced the "policy" favoring an end to litigation against preservation of the "strong policy" favoring the right to trial by jury. It concluded, contrary to the decision below, that where, as here, a court is called upon, in its discretion, to apply collateral estoppel in the absence of mutuality, a party should not be estopped where it had had no right to trial by jury in the first action. Enunciating the supremacy of the jury trial right over the policy of finality, the Court wrote:

"Since these cases clearly show that collateral estoppel is not always applied offensively in the

absence of mutuality, it would seem appropriate for this court to refuse to apply the doctrine when (1) the defendant had no right to a jury trial in the first action and (2) the plaintiff was not a party to the prior action in equity, but now seeks to use the earlier equitable decree as a sword against the defendant in an action at law. By carving this small exception into the offensive use of collateral estoppel, the court slightly compromises the policy favoring an end to litigation and preserves the strong policy favoring jury trial." 393 F. Supp. at 258.

It is respectfully submitted that the unprecedented application of collateral estoppel by the Court below to deny Petitioners their jury trial right was contrary not only to the Seventh Amendment, but also the strong federal policy favoring the jury trial right.

III

The Court below erred in construing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), to support its denial of Petitioners' jury trial right.

The Second Circuit here, and the Fifth Circuit in *Rachal*, supra, arrived at their conflicting results on the basis of diametrically opposite interpretations of this Court's decision in *Beacon Theatres*, supra. While the *Rachal* Court found *Beacon Theatres* to exemplify this Court's "great respect" for the jury trial right, 435 F.2d at 64, and upheld it against collateral estoppel, the Court below thought that *Beacon Theatres* evidenced this Court's "inherent respect for the doctrine of collateral estoppel" (App. A, p. 13a) and extinguished that right. However, *Beacon Theatres* and this Court's subsequent decision in *Meeker*, supra, show that

as between the constitutional jury trial right and the common law principle of collateral estoppel, the jury trial right is supreme.

In *Beacon Theatres*, this Court held that, in a single action presenting claims for equitable and legal relief, mandamus should issue to compel a jury trial of the common issues. Since in *Beacon Theatres* there was mutuality, had the trial court, without a jury, first tried the common issues, trial of the legal claim to a jury might have been precluded. 359 U.S. at 503-504. To preserve the jury trial right against possible destruction by estoppel, this Court held that the common issues should be tried first, to a jury. *Accord*, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

Significantly, neither *Beacon Theatres* nor *Dairy Queen*, *supra*, reached the question whether the right to a jury trial of the common issues would in fact have been lost had the equitable claims first been tried to a court alone. That question was subsequently presented to this Court in *Meeker*. The Court below, however, apparently without taking *Meeker* into account, assumed, on its reading of *Beacon Theatres*, that a prior trial of equitable claims would result in loss of the jury trial right of issues common to legal claims. App. A, pp. 10a-11a. *Meeker* disproves such an assumption and the interpretation given *Beacon Theatres* by the Court below.

In *Meeker*, plaintiffs asserted both legal and equitable claims, which presented common issues, and demanded a jury. The trial court, however, tried and determined the equitable claim—and perforce the common issues—adversely to plaintiffs. As a result, plaintiffs were precluded from relitigating those issues to a jury on the legal claim. Plaintiffs thereupon appealed, claiming that they had been denied their jury trial right. The Court of Appeals for the

Tenth Circuit rejected plaintiffs' contention.* 308 F.2d at 884.

Though in *Meeker* plaintiffs had not sought mandamus to protect their jury trial right and there was no question that they had been accorded a full and fair trial by the court alone, this Court, on the basis of *Beacon Theatres* and *Dairy Queen*, reversed the Court of Appeals and thereby preserved the jury trial right against destruction by estoppel. Plaintiffs were thereby afforded a retrial, to a jury, of the very same issues which a court had tried and determined adversely to them.** Relying upon *Beacon Theatres* and *Dairy Queen*, the Sixth Circuit reached the identical result in *National Union Electric Corp. v. Wilson*, 434 F.2d 986 (1970). There the Court wrote:

"When the Court denied trial by jury, the appellants could have filed an action in mandamus in this Court, or they could have moved to file an interlocutory appeal. Had they done either, they might have obtained the relief they are now seeking and thus they would have avoided the ten days' trial before the Court. Nothing in the papers before us, however, suggests that the defendants waived trial before a jury, and in our opinion they may review the order denying jury trial in an appeal taken after rendition of judgment." 434 F.2d at 988. (citations omitted)

Thus, contrary to the decision below, it is seen from *Meeker* and *National Union* that where, as here and in *Rachal*, there is a right to a jury trial that right may not

* The facts in *Meeker*, *supra*, are discussed in the Court of Appeals decision, 308 F.2d 875; see 5 MOORE'S FEDERAL PRACTICE ¶38.11[8.-6] at 128.13 (2d ed. 1977).

** The fact of the retrial in *Meeker* appears in the District Court Docket, Civ. No. 8212 (W.D. Okla.), and the Judgment therein filed December 14, 1965.

be denied either (a) because a party had been "accorded a full and fair opportunity to try those issues in the prior [non-jury] proceeding" (App. A, p. 7a) or (b) because a party does not seek mandamus or take other measures prior to the non-jury trial.* Nor may the jury trial right be denied because of considerations such as finality and judicial economy. App. A, pp. 13a-14a. As *Beacon Theatres, Dairy Queen*, and *Meeker* show, and as the Fifth Circuit, in *Rachal*, recognized, such considerations must bow to the preservation of the jury trial right.** To borrow the words of this Court in *Curtis v. Loether, supra*, "these considerations are insufficient to overcome the clear command of the Seventh Amendment." 415 U.S. at 198.

Nor does *Katchen v. Landy*, 382 U.S. 323 (1966), support the interpretation given *Beacon Theatres* by the Court

* While the Court below relied on *Goldman, Sachs & Co. v. Edelstein*, 494 F.2d 76 (2d Cir. 1974), that case cannot support its conclusion that trial of the SEC enforcement action, without objection by Petitioners, resulted "in the destruction by collateral estoppel of the defendants' right to a jury trial of the same issues". App. A, p. 19a. To the contrary, as will be seen (pp. 27-32, *infra*), there were no valid grounds upon which to object to the trial of the SEC action. As seen in *Securities and Exchange Commission v. Wills*, [Current Transfer Binder] CCH Fed. Sec. L. Rep. ¶96,321 (D.D.C. 1978), any objection to the trial of that action would have been fruitless.

Goldman, Sachs in no respect has any relevance to the circumstances here. Unlike the SEC action here, in which the jury trial right had never existed, *Goldman, Sachs* involved the issuance of mandamus to avoid the loss, through collateral estoppel, of a jury trial in a private action where such right had existed but had been waived.

** The suggestion of the Court below that where there had been a full and fair non-jury determination of certain facts in a prior action there is no genuine issue as to those facts in a second action in which there is a jury trial right (App. A, p. 9a) begs the very question of the applicability of collateral estoppel. It is only where, unlike the case here, collateral estoppel can properly be invoked that findings in one action can be applied in a second action to render a factual issue undisputed.

below. App. A, pp. 12a-13a. In *Katchen*, in a summary proceeding in the bankruptcy court in which there was no jury trial right, a trustee in bankruptcy obtained a judgment against a creditor-claimant ordering the surrender of a voidable preference. The creditor contended that he was thereby deprived of the constitutional jury trial right he would have had had the trustee brought a plenary action and therein sought recovery of the preference.

This Court rejected the creditor's contention. It held that by presenting his claims in the bankruptcy court the creditor had voluntarily submitted himself to the jurisdiction of that court and, therefore, that court, in equity, could adjudicate any issues relating to his claims. As this Court wrote:

"But although petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity." 382 U.S. at 336.

Though the creditor attempted to rely upon *Beacon Theatres* and *Dairy Queen*, this Court questioned whether those cases were at all applicable to *Katchen*. 382 U.S. at 339. It also noted that both those cases recognized that in certain situations a court could properly resolve an equitable claim first and thereby dispose of the issues involved in a legal claim. 382 U.S. at 340. Where, as in *Katchen*, there is mutuality, such a result would not be inconsistent with the Seventh Amendment's preservation of the jury trial right. Here, however, since there is no mutuality,

Katchen in no respect supports the denial of Petitioners' jury trial right.*

Finally, the validity of the Fifth Circuit's reading of *Beacon Theatres*, as contrasted with that of the Second Circuit, may also be seen in *Beacon Theatres*' reference to *Dimick v. Schiedt*, *supra*. Repeating what had been said in *Dimick*, this Court, in *Beacon Theatres*, wrote:

"We granted certiorari, 356 U.S. 956, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick v. Schiedt*, 293 U.S. 474, 486." 359 U.S. at 501.

It is respectfully submitted that the *Rachal* Court, unlike the Court below, correctly understood *Beacon Theatres* as reflecting this Court's great respect for the jury trial right. The Fifth Circuit interpreted *Beacon Theatres* as this Court had in *Simler v. Conner*, *supra*, where *Beacon Theatres* was cited for the proposition that "[t]he federal policy favoring jury trial is of historic and continuing strength." 372 U.S. at 222. It is thus apparent that in *Rachal* the Fifth Circuit, in reliance upon *Beacon Theatres*, correctly upheld the jury trial right against a claim of collateral estoppel in circumstances indistinguishable from those here.

* Two other inapposite cases relied upon by the Court below are *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1965) and *H. L. Robertson & Assoc. Inc. v. Plumbers Local No. 519*, 429 F.2d 520 (5th Cir. 1970). App. A, p. 8a n.1. In each of those cases, unlike the case here, there was mutuality.

IV

The Court below, establishing an unprecedented and demonstrably untenable rule, erroneously held that the constitutional jury trial right in a private action for damages is waived where, as here, such action cannot be expedited and tried prior to the trial of a related SEC enforcement action.

Notwithstanding the fact (a) that a right to trial by jury did not exist in the SEC enforcement action and (b) that, at the time the trial of that action was ordered, this action was not ready for trial, the Court below concluded that the Seventh Amendment jury trial right in this action had been waived. App. A, pp. 18a-19a. Respondent certainly did not claim, and the District Court did not find, any such waiver. That question was first raised by the Court below, which did so on demonstrably untenable grounds.

Thus, the Court below ruled that Petitioners—the sole defendants in the SEC action but only two of the 14 defendants named in this action—should have sought "to expedite trial of the present action" to preserve their jury trial right. App. A, p. 14a. However, the trial of this action could not have been so expedited to avoid a prior non-jury determination of the common issues. The ruling not only was wholly unrealistic in light of the procedural posture of each of the cases, but also does violence to the well-established policy requiring SEC enforcement actions to be tried without being delayed by private litigation.

The SEC action was commenced on May 5, 1976 and ordered to trial on June 2, 1976. At that time, pre-trial discovery in this action was far from complete. There would have been no way, in the four weeks between the

commencement and the trial of the SEC action, for the parties to this action to have prepared for, and proceeded to, trial. This is to say nothing of the fact that Respondent's May 20, 1976 motion to amend his complaint in this action was not decided until September 3, 1976, months after the trial in the SEC action had been concluded.

Nor could Petitioners have stayed the trial of the SEC action until after this action was made ready for trial and tried. *Securities and Exchange Commission v. Wills, supra*; see *Securities and Exchange Commission v. Everest Management Corp.*, 475 F.2d 1236 (2d Cir. 1972); *Securities and Exchange Commission v. General Host Corp.*, 60 F.R.D. 640 (S.D.N.Y. 1973), *aff'd*, 508 F.2d 1332 (2d Cir. 1975); *Securities and Exchange Commission v. National Student Marketing Corp.*, 59 F.R.D. 305 (D.D.C. 1973).

In *Wills, supra*, defendants, relying upon the decision below, sought to preserve their jury trial right in certain private actions by moving for a stay of the trial of a related SEC enforcement action until after the private actions had been tried. In *Wills*, as was the case here, the private actions were not ready for trial at the time the SEC action was ordered to trial. The Court, finding that Congress had intended that SEC actions should proceed unobstructed by private litigation, denied the motion. The Court wrote:

"The SEC is charged with statutory responsibility to vindicate the public interest. It perceives the threat of future violations and moves to prevent them. Congress was at pains to make it abundantly clear that the Commission in such circumstances should proceed unobstructed by private litigation.

See, e.g., S. Rep. No. 94-75, 94th Cong., 1st Sess. 76-77 (1975). The Commission is ready, discovery is completed, a trial date is set, and the case will proceed with trial to the Court." [Current Transfer Binder] CCH Fed. Sec. L. Rep. at p. 93,072.

In *Everest Management, supra*, the Second Circuit also refused to delay an SEC enforcement action even to permit intervention by parties claiming to have been defrauded in the very transaction complained of by the SEC. There, Judge Timbers, a member of the panel below, wrote:

"Appellants argue, accordingly, [on the basis of *Rachal v. Hill, supra*] that, unless intervention in the present SEC action is permitted, a total relitigation of the issues would be required in a subsequent action.

"Suffice it to say that in our view it is preferable to require private parties to commence their own actions than to have SEC actions bogged down through intervention." 475 F.2d at 1240 n.5.

The same policy was sounded in *General Host, supra*, where the Court stated:

"As a matter of general policy, it is undesirable that SEC actions for injunctive relief, whose sole purpose is the expeditious safeguarding of the public interest, be subjected to the delays that are inherent in private litigations, with their different concerns, even where those private actions parallel the SEC complaint.'" 60 F.R.D. at 641-642.

It is thus apparent that there is no merit whatsoever to the unprecedented and untenable rule established by the

Court below that to avoid waiver of the jury trial right in a private action for damages, such action must be expedited and tried prior to the trial of a related SEC action. Since this action could not have been so expedited and tried, there could not have been any such waiver.*

V

The Court below established an unprecedented and futile requirement in erroneously holding that Petitioners waived their jury trial right in this action by not having requested a jury in the related SEC enforcement action in which the jury trial right did not exist.

The Court below erroneously concluded that Petitioners waived their jury trial right in this action by not having requested the trial court in the SEC action to exercise its discretion, pursuant to Rule 39(b), Fed.R.Civ.P., to order that action to be tried to a jury. App. A, p. 14a. Such a conclusion is demonstrably untenable. Subsequent to the decision below, the Second Circuit itself found such a request to be groundless. *Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc.*, [Current Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 96,351 (1978).

* Even if, *arguendo*, there were any merit to the waiver concept of the Court below, it is respectfully submitted that it should not have been applied here. Its application in this action was grossly unjust, particularly in view of the fact that the important jury trial right was at stake. The Fifth Circuit, in *Rachal, supra*, and the cases which followed it, represented, at the very least, highly respectable authority upon which Petitioners were entitled to, and did, rely. Indeed, the District Court in this case had also relied upon *Rachal* in refusing to permit collateral estoppel to extinguish Petitioners' jury trial right. App. E, p. 26a.

Since the decision below represented the first holding in conflict with established authority, it should not have been applied retroactively against Petitioners. See *England v. Louisiana Medical Examiners*, 375 U.S. 411, 422 (1964).

A jury trial under Rule 39(b) could not have been properly demanded in the SEC enforcement action. Rule 39(b) is expressly limited to "an action in which such a [jury] demand might have been made of right", and there certainly was no such right in the SEC enforcement action. *Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc., supra*; *Securities and Exchange Commission v. Wills, supra*; *Securities and Exchange Commission v. Associated Minerals, Inc.*, 75 F.R.D. 724 (E.D. Mich. 1977); *Securities and Exchange Commission v. Petrofunds, Inc.*, 420 F. Supp. 958 (S.D.N.Y. 1976).

Accordingly, contrary to the decision below, Petitioners could not have waived their constitutional jury trial right in this action by not making a groundless Rule 39(b) request for a jury trial in the SEC action.

VI

The Court below erroneously held that Petitioners waived their jury trial right in this action by not having requested an advisory jury in the related SEC enforcement action, notwithstanding the fact that the use of an advisory jury could not satisfy a Seventh Amendment jury trial right.

The Court below also erroneously held that Petitioners waived their jury trial in this action by not having requested an advisory jury in the SEC action pursuant to Rule 39(e), Fed.R.Civ.P. App. A, p. 14a. An advisory jury could have had no bearing whatsoever upon Petitioners' Seventh Amendment jury trial right. *Securities and Exchange Commission v. Wills, supra*. "By its nature, the function of the advisory jury is to enlighten the conscience of the trial court and the jury's verdict has no binding effect upon that court." 5 MOORE'S FEDERAL PRACTICE

¶39.10[3] (2d ed. 1977); *Mallory v. Citizens Utilities Company*, 342 F.2d 796 (2d Cir. 1965); *(American) Lumbermens Mutual Casualty Co. of Illinois v. Timms & Howard, Inc.*, 108 F.2d 497 (2d Cir. 1939). Even where an advisory jury is used, the facts are to be found by the court, Rule 52(a), Fed.R.Civ.P., and the "review on appeal is from the court's judgment as though no jury had been present." *(American) Lumbermens Mutual Casualty Co. of Illinois v. Timms & Howard, Inc.*, *supra*, 108 F.2d at 500.

In *Wills*, the Court, rejecting the suggestion made by the Court below regarding the use of an advisory jury, wrote:

"The suggestion that an advisory jury might be used is, on analysis, misplaced. Defendants want to protect a perceived constitutional right to jury trial, but an advisory jury does not satisfy this right." [Current Transfer Binder] CCH Fed. Sec. L. Rep. at pp. 93,072-73.

It is respectfully submitted that, contrary to the decision below, to substitute for a jury, which a party has of constitutional right, an advisory jury, whose fact-finding is neither binding nor subject to review, would render the constitutional right illusory. Clearly, there could have been no waiver of Petitioners' Seventh Amendment jury trial right in this action merely because a request had not been made for an advisory jury in the SEC action.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 1977

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and
HERBERT N. SOMEKH,

Petitioners,

—against—

LEO M. SHORE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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ARGUMENT:—

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| A. The Seventh Amendment permits refinements in the role of judges in determining whether facts exist to be heard by a jury | 10 |
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IN THE
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PARKLANE HOSIERY COMPANY, INC. and
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—against—

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Respondent.

ON WRIT OF CERTIORARI TO THE
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 FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Opinion Below

The opinion of the Court of Appeals for the Second Circuit is reported at 565 F. 2d 815 (1977) and is set forth at Appendix A, pages 1a-19a, annexed to the petition for certiorari.*

Jurisdiction of This Court

The jurisdiction of this Court is adequately set forth in the Brief for Petitioners at page 2.

* Citation herein to pages of each of the five appendices annexed to the petition for certiorari will appear as follows: "App. —, p. —."

Constitutional Provision and Federal Rule Involved

Rule 1 of the Federal Rules of Civil Procedure provides:

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

The pertinent provision of the United States Constitution is set forth in the Brief for Petitioners at page 2.

Questions Presented

1. Was the decision of the Court below correct in precluding re-litigation by the Petitioners to a jury of issues already fully and fairly litigated to a court and there determined against them, while preserving for the Petitioners their Seventh Amendment jury trial right on all other issues, including the amount of damages, in this action?

2. Can refinements in the doctrine of collateral estoppel be introduced into the common law in a manner consistent with the first mandate of the Seventh Amendment, which relates to the preservation of the right to jury trial, while cases such as *Dimick v. Scheidt*, 293 U.S. 474 (1935) read the second mandate of the Amendment, which prohibits re-determination by a court of issues previously determined by a jury, more restrictively?

3. Is the decision below consistent with the decisions in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) and its progeny?

4. Was the observation by the Court below, that the Petitioners had lost their jury trial right in this action by failing to protect that right in a prior Securities and Exchange Commission enforcement action, mere dictum and not necessary for the decision below?

Statement of the Case

This action was commenced in the United States District Court for the Southern District of New York on November 13, 1974, against Petitioners and twelve other defendants who were officers, directors and/or shareholders of Petitioner Parklane Hosiery Company, Inc. ("Parklane") as of the date of the merger described below. The action was certified, by Order dated May 2, 1975, as a class action on behalf of all Parklane shareholders on September 14, 1974, the record date in connection with said merger. The Complaint, as amended (hereinafter the "Complaint"), alleged violations of Sections 10(b), 14(a) and 20(a) of the Securities Exchange Act of 1934, as amended (the "1934 Act"), 15 U.S.C. §§ 78j(b), 78n(a) and 78t(a), certain rules promulgated thereunder and the common law.

The action is based upon a false and misleading proxy statement dated September 24, 1974 (the "Proxy Statement") which the Complaint alleges fraudulently caused a merger (the "Merger") in which the public shareholders of Parklane were bought out of Parklane. As a result of the Merger, Parklane was merged with New PLHC Corp., a company incorporated solely to act as a corporation to merge with Parklane. Prior to the Merger, the individual defendants owned 71.6% of the issued and outstanding shares of Parklane. They transferred these shares to New PLHC Corp. immediately prior to the Merger and, at such time, their shares became its only asset. In full payment

for their Parklane shares, the public shareholders were paid, in the Merger, \$2.00 per share cash, whereas the individual defendants received shares of New PLHC Corp. and the right to participate in its future business.

Respondent alleged in the Complaint that the Proxy Statement was false and misleading in that, *inter alia*:

- (a) it made statements as to various reasons why Parklane would be converted to a privately-owned company when, in fact, the true undisclosed reason for its conversion was to aid Petitioner Herbert N. Somekh ("Somekh") in meeting his personal financial obligations;
- (b) it made statements concerning the termination of negotiations with the Federal Reserve Board of New York ("FRB") with regard to Parklane's leasing of property located in New York City from the FRB when, in fact, the defendants failed to disclose the existence of on-going negotiations with the FRB concerning the cancellation of such leasehold rights which negotiations could have resulted in Parklane receiving substantial benefits; and
- (c) it made statements that Parklane had employed two appraisers to determine the fair value of Parklane stock, when in fact the defendants failed to disclose in the Proxy Statement that the two appraisers were not provided with sufficient information to prepare and provide a true and complete valuation of such stock.

Respondent further alleged that the distribution of the Proxy Statement was part of a fraudulent scheme giving rise to liability to the Respondent and other members of the class under Section 10(b) and the common law.

In May, 1976, the Securities and Exchange Commission ("SEC") commenced an action in the Southern District of New York against Petitioners alleging that the Proxy Statement was false and misleading (the "SEC action"). After trial therein, the District Court, finding intentional violations by Petitioners of the 1934 Act, held:

- (a) "It is clear to me that the overriding purpose for the merger was to enable Somekh to repay his personal indebtedness. Had his finances been otherwise, the merger may never have occurred. There is not so much as a hint of Somekh's huge debts in the Proxy Statement. The non-disclosure [in the Proxy Statement] is clearly established." *Securities and Exchange Commission v. Parklane Hosiery Co., Inc.*, 422 F. Supp. 477, 482 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977).
- (b) "I find that the October 4 conference between Somekh and the authorized representative of the FRB falls within the common usage of the term 'negotiation' [footnote omitted]. Thus, the unamended proxy material was false when it stated that 'there are no negotiations at present'." *Id.*, 422 F. Supp. at 483.
- (c) "The failure to inform Thomson & McKinnon [one of the appraisers] of these facts and the failure to disclose the defect in the appraisal in the Proxy Statement is beyond question." *Id.*, 422 F. Supp. at 484.

The District Court further held that these misstatements in, and omissions from, the Proxy Statement were material and intentional. *Id.*, 422 F. Supp. at 486-487.

On July 8, 1977, the Court of Appeals for the Second Circuit specifically affirmed each of these findings of the District Court in the SEC action. 558 F.2d at 1086-1087.

In the SEC action, Petitioners had a full and fair opportunity to, and did, litigate the accuracy of the Proxy Statement. Nowhere in their papers before this Court, the Court below or the District Court did Petitioners even hint that they did not receive a full and fair adjudication in the SEC action. After that adjudication, both the District Court and Court of Appeals found the Proxy Statement to be materially and intentionally misleading for the reasons alleged in the Complaint.

After the District Court decision in the SEC action, Respondent moved for partial summary judgment on liability based on the factual findings in the SEC action. The District Court denied Respondent's motion. App. E., p. 26(a). Respondent then moved, pursuant to 28 U.S.C. §1292(b) and Rule 5, Fed. R. App. P., for certification of a question for appeal. The District Court granted the motion and the Court below granted the petition for leave to appeal.

The Court below, relying on numerous decisions of this Court including, in particular, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), unanimously reversed the District Court's decision. In so deciding, the Court below found no constitutional requirement that "... a party who has had issues of fact determined against it after a full and fair opportunity to litigate them in a non-jury trial of an action against it may, in a different suit against it by another person, obtain a jury trial of the same issues of fact arising out of the same transaction." App. A., pp. 2a-3a.

On December 20, 1977, (a) the Court below denied Petitioners' motion for rehearing and (b) the Court of Appeals for the Second Circuit denied Petitioners' suggestion that the action be reheard *in banc*.

This Court allowed certiorari by order filed on May 1, 1978 (page 62a of Appendix filed with Brief for Petitioners).

Summary of Argument

The decision below is consistent with almost 140 years of decisions by this Court which, as a result of the refinement and creation of procedural devices, have precluded from jury determination factual issues which could have been decided by juries at the time of the adoption of the Seventh Amendment in 1791. A procedural refinement consistent with that historical development was effected by this Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). In that case, this Court, by removing mutuality of estoppel as a prerequisite to the application of the doctrine of collateral estoppel, decided that a party which has had certain issues of fact determined against it, after a full and fair opportunity to litigate them, may not, in a different suit against it, re-litigate those same issues of fact. Based on the decision in *Blonder-Tongue*, Petitioners here are precluded from re-litigating in this action the factual issues determined in the SEC action. By its decision, the Court below did not deny Petitioners their Seventh Amendment jury trial right since they retain the right to a trial on all issues, including damages, not decided in the SEC action.

I. Numerous decisions of this Court, rendered as early as 1850, make clear that new procedural devices may be utilized by a judge to determine whether there are issues of fact to be decided by a jury. Precluding jury determination of the factual issues determined in the SEC action is consistent with the long-established principle, reiterated often by this Court, that new procedural methods

may be used to determine if facts are actually in issue. *Ex parte Peterson*, 253 U.S. 300 (1919).

The decision in *Dimick v. Schiedt*, 293 U.S. 474 (1935), is not relevant to the instant action since it deals with that part of the Seventh Amendment relating to the prohibition of a court's re-examination of issues decided by a jury. The instant action deals with that portion of the Amendment relating to the preservation of the jury trial right. Greater flexibility has been permitted the courts in cases involving the portion of the Seventh Amendment here in issue. See, e.g., *Ex parte Peterson*, *supra*; *Galloway v. United States*, 319 U.S. 392, *rehearing denied*, 320 U.S. 214 (1943).

II. Based upon considerations of fairness and equity, the doctrine of collateral estoppel should be applied in the instant case. *Blonder-Tongue Laboratories, Inc. v. University of Illinois*, *supra*, 402 U.S. at 333-334. Defendants were aware of this action when the SEC action was begun since this action had been commenced prior to the SEC action. *The Evergreens v. Nunan*, 141 F.2d 927, 929 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944).

III. The decision below properly analyzed *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) and its progeny, while the court in *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971), erred in its analysis of that line of cases. *Beacon Theatres* stands for the proposition that where a party joins legal and equitable claims arising out of the same transaction, the court must order the legal claim tried first by a jury so as to protect the jury trial right. In this action, scheduling is not in issue since the trial of the equitable claim was completed before this action could be tried. Therefore, based on the decision in *Beacon Theatres*, the court below correctly held that the determination of the issues on which

the equitable claim in the SEC action was based precludes the re-litigation of those issues in the instant action.

IV. The observation by the Court below, that Petitioners failed to protect their right to a jury trial in this action by their failure to either request a trial before a jury or an advisory jury in the SEC action or stay the trial of the SEC action pending trial of this action, was mere *dictum*. It was completely unnecessary to the decision below.

ARGUMENT

I.

The Court below did not deprive Petitioners of any jury trial right, but merely precluded re-litigation of the issues decided in the SEC action, leaving for jury determination all other issues.

The Seventh Amendment states:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Under the Seventh Amendment the purpose of the jury was, and is, to hear and decide facts in certain civil cases. The limits of the Seventh Amendment were interpreted by this Court in *Ex parte Peterson*, 253 U.S. 300, 310 (1919) where it wrote:

"No one is entitled in a civil case to trial by jury unless and except so far as there are facts to be determined."

For well over a hundred years, this Court has explored, accepted and advanced numerous procedures directed towards the initial determination of whether facts exist upon which a jury can make a decision and this Court has long held that such initial determination does not offend the dictates of the Seventh Amendment. In fact, such consideration is an integral part of the Seventh Amendment. As this Court stated in *Ex parte Peterson*, *supra*, at 309:

"It [the Seventh Amendment] does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adopt the ancient institution to present needs to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right."

A new method for determining whether facts are actually in issue was approved by this Court in *Blonder-Tongue*, *supra*. In that decision, mutuality of parties was recognized as no longer being a prerequisite to the application of collateral estoppel (See pp. 21, *et seq.*, *infra*.) By relying on that decision and precluding re-litigation by Petitioners of previously determined issues, the Court below reached its decision based on the road map for Seventh Amendment analysis provided by this Court.

A. The Seventh Amendment permits refinements in the role of judges in determining whether facts exist to be heard by a jury.

As early as *Parks v. Ross*, 11 How. 362, 372-373 (1850), this Court was extending the power of judges to determine whether facts were in issue for a jury to hear and decide.

This Court there, in approving the use of the directed verdict, stated:

"It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the court to decide all questions of law arising thereon. But a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is, therefore, error in the court to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred.

"Hence the practice of granting an instruction like the present, which makes it imperative upon the jury to find a verdict for the defendant, and which has in many States superseded the ancient practice of a demurrer to evidence. It answers the same purpose, and should be tested by the same rules. A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom."

This decision was an extension of the judge's role in determining whether facts existed to be heard by a jury. See *Greenleaf v. Birth*, 9 Pet. 292 (1835).^{*} This extension of the role of the Court has been re-affirmed often and in many different ways since 1850. For example, this Court held that a federal court, without the consent of the parties, may appoint auditors to hear testimony, examine books and accounts and frame and report upon issues of fact, as an aid to the jury in arriving at its verdict, *Ex*

^{*} Justice Black recognized in his dissent in *Galloway v. United States*, 319 U.S. 372, 402, *rehearing denied*, 320 U.S. 214 (1943) that the decision in *Parks v. Ross* was "an innovation, a departure from the traditional rule restated only fifteen years before" in *Greenleaf v. Birth*, *supra*. He found the directed verdict approved in *Parks v. Ross*, *supra*, to be a significant departure from the demurrer to the evidence and that it therefore contained new potentialities for judicial control of the jury.

parte Peterson, supra. A court may require both a general and a special verdict and set aside the general verdict for the defendant on the basis of the facts specially found. *Walker v. New Mexico & Southern Pacific R. Co.*, 165 U.S. 593 (1897). A court may accept so much of the verdict as declares that the plaintiff is entitled to recover, and set aside so much of it as fixes the amount of the damages, and order a new trial of that issue alone. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931). None of these procedures was known to the common law; all have been approved by this Court.

In *Galloway v. United States*, 319 U.S. 372, 389-392 (1943), this Court re-affirmed the constitutionality of the directed verdict. There, this Court explicitly stated that, since 1791, the interpretation of the Seventh Amendment has permitted changes in the procedure by which the judge determines whether there are factual issues to be decided by the jury.

"It is not that 'the rules of the common law' in 1791 deprived trial courts of power to withdraw cases from the jury, because not made out, or appellate courts of power to review such determinations. The jury was not absolute master of fact in 1791.

• • •

"Nor were 'the rules of the common law' then prevalent [in 1791], including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. *On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries.* In 1791 this process already had resulted in widely divergent common-law rules on procedural matters among the states, and between them

and England. And none of the contemporaneous rules regarding judicial control of the evidence going to juries or its sufficiency to support a verdict had reached any precise, much less final, form." (Emphasis added). (Footnotes omitted).

The reasoning of this Court in *Galloway* is based on a sound historical analysis of the Seventh Amendment. The lack of uniformity of the relationship between judge and jury in the several states and the bearing which that divergence has on the interpretation of the Seventh Amendment is described in Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289 (1966) (hereinafter cited as "Henderson") which states:

"Nowhere in the history of the Philadelphia convention, the ratifying conventions of the several states, or the specific 'legislative history' of the Bill of Rights can any evidence be found that the relation of judge to jury was considered as affected in any but the most general possible way by the seventh amendment, or even that it was considered at all. Nor can any implicit understanding as to this relationship be presumed, for among the thirteen original states there were at least half a dozen widely differing patterns of civil practice, as an examination of the available case law will show. On the contrary, it was well understood that no single system of civil practice could satisfy everybody. The varied procedures of the federal courts in the early years provide further evidence that no particular pattern was understood to be prescribed." 80 Harv. L. Rev. at 290.

Since the relationship between the judge and jury is not codified in the Seventh Amendment, this Court has permitted review of, and refinements to, that relationship. As

the author suggests at the conclusion of the Henderson article, instead of freezing judicial control of the jury to some 1791 standard or standards, the course which this Court has followed has, on the whole, preserved

"... the substance of the common law trial by jury and particularly the jury's power to decide serious questions of fact, while allowing rational modifications of procedure in the interests of efficiency. *The whole thrust of the history of jury practice, both before and after 1790, has been toward rationality of decision and economy of motion in the courtroom.* It is possible to argue for or against the merits of any particular procedural change. But considering the diversity of practice that lies behind the seventh amendment, it seems both unnecessary and undesirable to read that amendment as imposing any but the most general limitations on the Court's power to make such procedural changes." 80 Harv. L. Rev. at 336-337. (Emphasis added). (Footnotes omitted).

In short, the history of the Seventh Amendment demonstrates that procedural changes and refinements in the relationship of judge to jury are not only not repugnant to the Amendment, but quite the contrary, they are required in order to make the jury an efficient instrument of justice. The decision of the Court below, granting collateral estoppel effect to the findings in the SEC action, based upon the decision of this Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), is simply another refinement, approved by this Court, to the relationship of judge to jury. Preclusion of re-determination of the facts found in the SEC action in no way deprives defendants of any Seventh Amendment rights; it is merely a specific method by which the Court below found that certain facts do not exist for jury determination.

This Court stated in *Colgrove v. Battin*, 413 U.S. 149, 157 (1973):

"the purpose of the jury trial in . . . civil cases [is] to assure a fair and equitable resolution of factual issues."

This Court has also stated, in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977) that "factfinding . . . is the essential function of the jury in civil cases". Where there are no factual issues to be determined, as is the case here with respect to those issues determined in the SEC action, there is no right to a jury trial since to have a jury trial on those issues would be without purpose. As to the determination of all other factual issues, however, the decision below assures the Petitioners of the right to their determination by a jury.

B. *Dimick v. Scheidt*, 293 U.S. 474 (1935), related to a portion of the Seventh Amendment not here in issue and the Petitioners' reliance thereon is misplaced.

Dimick v. Scheidt, *supra*, relied upon by the Petitioners, is not a contrary precedent that must be considered in determining this case. The Seventh Amendment contains two specific mandates. First, that in civil actions "... the right of trial by jury shall be preserved ..." and, second, that in civil actions "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The specific question confronting the *Dimick* Court was whether, after a determination of damages by a jury, a trial judge could deny a plaintiff a new trial if the defendant agreed to pay damages in excess of those awarded by the jury. Thus, this Court in *Dimick* was interpreting the

second mandate of the Seventh Amendment. Accordingly, the decision in *Dimick* is inapplicable to this case which rests upon an interpretation of the first mandate of the Amendment. That *Dimick* only related to the clause controlling re-examination of facts determined by a jury is made clear by the language of that decision. After quoting the Seventh Amendment, this Court wrote:

"Section 269 of the Judicial Code, as amended, U.S.C. Title 28, §391, confers upon all federal courts power to grant new trials 'in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. . .'

"In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791. *Thompson v. Utah*, 170 U.S. 343, 350; *Patton v. United States*, 281 U.S. 276, 288. A careful examination of the English reports prior to that time fails to disclose any authoritative decision sustaining the power of an English court to increase, either absolutely or conditionally, the amount fixed by the verdict of a jury in an action at law, with certain exceptions." 293 U.S. at 476-477.

This Court long ago recognized that the Seventh Amendment contains two different mandates which require separate interpretations. In *Parsons v. Bedford*, 3 Pet. 433, 447-488 (1830), Justice Story, in analyzing the Seventh Amendment, wrote that it consisted of two clauses. After analyzing the preservation clause, he wrote of the second:

"But the other clause of the amendment is still more important; and we read it as a substantial and independent clause. 'No fact tried by a jury shall be other-

wise re-examinable [*sic*], in any court of the United States, than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner." (Emphasis added)

A close examination of the two rights being protected demonstrates that a more restrictive standard should be applied in interpreting the second mandate of the Seventh Amendment. In protecting the right to trial by jury, the first right set forth in the Amendment, this Court has expressly stated that "new methods may be introduced for determining what facts are actually in issue" so as to adapt the "ancient institution [the jury] to present needs to make of it an efficient instrument in the administration of justice" *Ex parte Peterson*, *supra*, 253 U.S. at 309. The second right protected is the right to have a jury's factual determination stand. No improvement on the jury as an "efficient instrument in the administration of justice" can be made by granting judges the right to re-examine facts tried by jury. The jury trial has been completed, the time has been spent and the "ancient institution" has performed its functions.

It was in protecting the second right in the Seventh Amendment that this Court, in *Dimick*, analyzed the Amendment restrictively. Accordingly, the decision and its rationale are inapplicable to the instant action.

Even assuming, *arguendo*, that *Dimick* is here applicable, it should not disturb the ruling of the Court below since it is inconsistent with the long line of cases cited by plaintiff above and has been closely limited to its particular facts. See, Henderson, 80 Harv. L. Rev. at 336. *Dimick's* 5-4 majority decision was strongly criticized in a dissent by Justice Stone, in which he was joined by Justices Bran-

deis and Cardozo and Chief Justice Hughes. However, to the extent that it is good law, it merely stands for the proposition that certain devices are acceptable to this Court to regulate judicial control over the jury and others are not. The specific device proposed in *Dimick* was found unacceptable. That does not mean that all refinements are unacceptable. The decision in *Galloway v. United States*, *supra*, decided only eight years after *Dimick v. Scheidt*, proves that *Dimick* is not the absolute bar to procedural innovation and refinements as claimed by the Petitioners here.

C. Petitioners' reliance on cases requiring juries to determine factual issues in cases based on post-1791 statutes is misplaced since the issue here is whether issues already determined by a judge must be heard for a second time by a jury.

Petitioners' argument that a jury trial right exists under the Seventh Amendment with regard to claims for damages brought under post-1791 statutes is misdirected and their reliance on this Court's decision in *Curtis v. Loether*, 415 U.S. 189 (1974), is misplaced. Plaintiff does not contend that an ordinary, garden-variety action at law brought under a post-1791 statute would not require a jury trial. Yet that is the proposition for which *Curtis v. Loether* stands and is, therefore, irrelevant to the issue here presented. That case was merely

"... an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right . . .". 415 U.S. at 195.

Similarly, Petitioners' reliance on *Pernell v. Southall Realty*, 416 U.S. 363 (1974), is misplaced as the issue there, as in *Curtis*, related to the analogy of a post-1791-created right to a pre-1791 form of action. *Curtis*, *Pernell* and the

related cases cited by Petitioners are directed at the wrong issue.* The question here presented is not whether the cause of action would have been one at law in 1791. The question instead is—given that it is a legal claim in issue, based on a post-1791 statute, are certain issues to be precluded from jury determination. On the issues not yet decided, including damages, the petitioners will, according to the decision below and consistent with *Curtis*, *supra*, and *Pernell*, *supra*, be entitled to a jury trial.

II.

Collateral estoppel is a method fashioned by the courts to permit judges to decide that certain facts are not in issue and its application here precludes the relitigation by the Petitioners of facts determined in the SEC action.

Collateral estoppel permits the preclusion of relitigation of certain factual issues which were actually litigated in a prior suit and upon which final judgment was entered. When a court approves the application of the doctrine, the party against whom the doctrine is invoked will not be permitted to re-try the issues which he has had a full and fair opportunity to try in an earlier suit. See, *e.g.*, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Crane Co. v. American*

* *Ross v. Bernhard*, 396 U.S. 531 (1970), is unnecessary to the decision below insofar as it stands for the proposition that the historical inquiry has been weakened in determining whether claims are legal or equitable in nature. First, as previously noted, the nature of the claim is not here in issue. In addition, the "abstruse historical inquiry" to which this Court was there referring (396 U.S. at 538, n. 10) related to the custom before the merger of law and equity arising from the adoption of the Federal Rules of Civil Procedure in 1938, not an inquiry as to pre-1791 custom.

Standard, Inc., 490 F.2d 332 (2d Cir. 1973); *Humphreys v. Tann*, 487 F.2d 666 (6th Cir. 1973) *cert. denied*, 416 U.S. 956 (1974); *Ritchie v. Landau*, 475 F.2d 151 (2d Cir. 1973); *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); 1 B *Moore's Federal Practice*, ¶0.441 [2] (2d ed. 1974).

A. Mutuality of parties is no longer a pre-requisite to the application of the doctrine of collateral estoppel.

For a long time, courts had required that there be mutuality between the parties before the doctrine was applied. While the majority of courts were requiring mutuality, however, the doctrine was being eroded from within and without the judiciary. In *Zdanok v. Glidden Co.*, *supra*, 327 F.2d at 954-955, the court stated the history and the reasoning for the elimination of mutuality as follows:

"This doctrine of the need for mutuality of estoppels, criticized by Bentham over a century ago as destitute of any semblance of reason, and as 'a maxim which one would suppose to have found its way from the gaming-table to the bench,' *ibid.* fn. 14, has been much eroded in recent years. Perhaps the leading federal decision is Judge Hastie's in *Bruszewski v. United States*, 181 F.2d 419 (3 Cir.), *cert. denied*, 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950), which this court followed in *Adriaanse v. United States*, 184 F.2d 968 (2 Cir. 1950), *cert. denied*, 340 U.S. 932, 71 S.Ct. 495, 95 L.Ed. 673 (1951). We see no purpose in multiplying citations since it is recognized that the widest breach in the citadel of mutuality was rammed by Justice Traynor's opinion in *Bernhard v. Bank of America*, 19 Cal.2d 807, 811, 813, 122 P.2d 892, 894-895 (Calif. 1942). Having explained why 'The criteria for determining who may assert a plea of res judicata

differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted,' and that there is 'no compelling reason . . . for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation,' he said:

'In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?' (Footnote omitted).

This Court in *Blonder-Tongue*, *supra*, invoked the doctrine of collateral estoppel in a patent infringement action where the plaintiff sought to prove the validity of a patent which had earlier been proven invalid, against a defendant who was not a party to the first suit. A unanimous court, approved the use of collateral estoppel even though one of the parties to the second suit had not been a party to the prior action. The Court established that the fundamental issue is not whether there is mutuality of parties, but ". . . whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." 402 U.S. at 328.

Numerous decisions subsequent to *Blonder-Tongue* relating to various other issues, have upheld the right of a plaintiff who was not a party to the first action to apply the doctrine of collateral estoppel and preclude the relitigation of issues fully and fairly adjudicated against the defendants in a prior action. *Humphreys v. Tann*, *supra* (airplane crash): *Garcy Corp. v. Home Insurance Co.*,

496 F.2d 479 (7th Cir. 1974) (insurance); *Skrzat v. Ford Motor Co.*, 389 F. Supp. 753 (D.R.I. 1975) (personal injury); *Michini v. Rizzo*, 379 F. Supp. 837 (E.D. Pa. 1974) (civil rights); 1 B *Moore's Federal Practice*, ¶ 0.441 [2] (2d ed. 1974) and cases cited therein.

For example, the court in *Humphreys v. Tann, supra*, an action for damages resulting from an airplane collision, blessed the offensive use of collateral estoppel.

"While the doctrine of collateral estoppel permits a prior judgment to preclude relitigation of an issue previously determined on its merits, it may be applied in favor of a stranger to the first action, but only against a party to that action." 487 F.2d at 671. (Emphasis in original).

Once, therefore, an issue has been fully and fairly litigated, a litigant may estop a party to re-litigate the same issue in a subsequent suit. It is, however, necessary for the party against whom the plea of estoppel is asserted to have been either a party to, as the Petitioners herein, or in privity with, a party in the prior case. *Blonder-Tongue*, 402 U.S. at 323-324.

The facts in the instant action, that the Proxy Statement was false and misleading in failing to state that the true purpose of the Merger was to bail out Somekh from certain personal obligations, in failing to describe the status of Parklane's negotiations with the FRB and in failing to disclose the status of those negotiations to Parklane's appraisers, were specifically found in the SEC action. Parklane and Somekh were parties to the earlier action and have already fully litigated these issues. Accordingly, they should not be permitted to do so again.

The reasons for precluding re-litigation of the issues determined in the SEC action are clear. Referring to

Rule 1, F. R. Civ. P., the Court below stated that to grant Petitioners a trial on the issues determined in the SEC action:

"... would violate basic principles of fairness, finality, certainty, economy in utilization of judicial resources, avoidance of possibly inconsistent results, and achievement of the 'just, speedy and inexpensive determination of every action,' Rule 1, F. R. Civ. P." App. A, pp. 13a-14a (Footnotes omitted).

B. No unfairness can be shown by the Petitioners herein to prevent the application of collateral estoppel.

Certain commentators and courts have questioned the offensive use of collateral estoppel where it would result in unfairness against the person who is being estopped, such as where numerous individual actions are brought as a result of a mass tort. See, *Zdanok v. Glidden Company, supra*, 327 F.2d at 955-956, citing Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281 (1957). *Contra, United States v. United Air Lines, Inc.*, 216 F. Supp. 709 (Nev. 1962), *aff'd in part, modified in part on other grounds sub nom. United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964).

Here, however, it is entirely fair to permit the plaintiff to benefit from the prior litigation. The Petitioners are not likely to face additional actions since this is a certified class action and, as in all actions so certified, only those who seek exclusion from the class have the right to litigate separately the transaction here in issue, Fed. R. Civ. P. Rule 23.

Moreover, as in *Zdanok v. Glidden Co., supra*, the opportunity to litigate the prior action herein was both full and fair. It is unquestionable that in the SEC action, not only did the Petitioners have a full opportunity to, but they did,

litigate the accuracy of the Proxy Statement. Nowhere in any of Petitioners' papers to this Court, the Court below, or the district court, did the Petitioners even hint that they did not receive a full and fair adjudication in the SEC action. Accordingly, they should be estopped to litigate the same issues again.

Another criterion for determining the fairness of applying collateral estoppel was suggested in *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944). That standard was the foreseeability of subsequent actions at the time of the commencement of the first suit. In the instant action, unlike *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971), heavily relied upon by the Petitioners, Respondent began his suit, based on the same subject matter as the SEC action, over a year before the SEC injunction proceeding began. Respondents did not have to foresee this action when the SEC action began; this action was already being prosecuted. In addition, this action was certified as a class action prior to the institution of the SEC action. Clearly, there would be no unfairness in applying the collateral estoppel doctrine here.

Numerous other policy considerations favor applying the doctrine of collateral estoppel here, based upon the prior SEC action. As set forth in Comment, *The Effect Of SEC Injunctions in Subsequent Private Damage Actions—Rachal v. Hill*, 71 Col. L. Rev. 1329, 1336-1337 (1971):

"The courts have consistently recognized the need for private actions to insure effective enforcement of the securities laws. They are a private policing weapon supplementing governmental action. The desirability of promoting the use of that weapon is under-

scored by the questionable efficacy of relying solely upon governmental enforcement measures.

"It appears to follow from this important function of private suits and from the amount of government energy and expense utilized in securing SEC injunctions that a misdirection of efforts would result if the private plaintiff were not able to derive significant benefit from a successful SEC action.

"The value of utilizing the original Commission action in subsequent private tests is underlined by the fact that, employed in isolation from other measures, the SEC injunction suit may often have only a limited effect. When the Commission brings a court action for injunctive relief, the after-the-fact nature of the decree brings into question its practical effect, particularly in the area of misrepresentation and collusion under rule 10b-5. As Judge Friendly pointed out in *SEC v. Texas Gulf Sulphur Co.*, an injunction is not an effective remedy for dealing with a scheme like that in *Rachal v. Hill*, because the violation is normally a once-in-a-lifetime occurrence." *Id.* at 1336-1337. (Footnotes omitted).

In the instant situation, there was not even an injunction issued in the SEC action because, while the omissions from the Proxy Statement were found to be material and knowing, the court in the SEC action felt that an injunction was unwarranted. Rather, it looked to the instant action, *inter alia*, to redress the harm inflicted upon the class. *Securities and Exchange Commission v. Parklane Hosiery Co.*, 422 F. Supp. 477, 486 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977). It is, therefore, clear that there would be no unfairness in precluding re-litigation here of the facts determined in the SEC action.

The court-created doctrine of collateral estoppel, as extended by the courts to remove the requirement of mutuality, and in particular by this Court in *Blonder-Tongue*, *supra*, is a procedural refinement adopted after 1791. As with other procedural refinements and changes approved after the adoption of the Seventh Amendment, it may be used by a court to determine whether factual issues exist for jury determination. The test is whether the court may preclude jury determination in a manner just and equitable which would retain the jury's function as an efficient instrument in the administration of justice. It is respectfully submitted that preclusion of the issues determined in the SEC action, through application of the doctrine of collateral estoppel, which would still permit a jury to determine all other issues here in dispute, is consistent with both the Seventh Amendment and the present status of the doctrine of collateral estoppel.

III.

The Court below properly analyzed this Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) whereas the Fifth Circuit did not in *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971).

The decision of the Court below is in conflict with that of the Fifth Circuit in *Rachal*, *supra*, decided before *Blonder-Tongue*, *supra*. *Blonder-Tongue* appears to overrule *Rachal* in its removal of the mutuality requirement. *Blonder-Tongue* decided that a litigant is not entitled to "more than one full and fair opportunity for judicial resolution of the same issue." 402 U.S. at 328. (Emphasis added). That decision does not state that a jury determination is required to preclude re-litigation.

If this Court does not agree that *Blonder-Tongue* overruled *Rachal*, it is clear that the decision below is correct. The decisions in both *Rachal* and the Court below are based upon an analysis of this Court's decision in *Beacon Theatres*. It is respectfully submitted that the decision below is consistent with that in *Beacon Theatres*, whereas that of the Fifth Circuit in *Rachal* is not.

In *Rachal*, the plaintiff, in a private action seeking money damages, sought by the application of the collateral estoppel doctrine, to estop the defendants to deny facts found against them in a prior SEC injunction action and, on that basis, to award plaintiff summary judgment. The Fifth Circuit did not permit the application of the doctrine holding that to apply it, in that case, would deny the defendants their right to a jury trial. In so holding, the Court in *Rachal* relied upon *Beacon Theatres*, *supra*.

In *Beacon Theatres* this Court held that, in a single action in which an equitable claim and a legal counterclaim were presented the legal counterclaim had to be tried prior to the equitable claim. In so holding this Court recognized that the failure to try the legal counterclaim first would result in the loss of the defendants' rights to a jury trial on that claim, stating:

"Thus the effect of the action of the District Court could be, as the Court of Appeals believed, 'to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit,' for determination of the issue of clearances by the judge might 'operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim.'" *Id.* at 504.

This Court in *Beacon Theatres* recognized that when in a single action neither an equitable nor a legal claim had yet been heard, the legal claim must be heard first in order to avoid precluding a jury trial on that legal claim. *Accord*, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Meeker v. Ambassador Oil Co.*, 375 U.S. 160 (1963) (*per curiam*), *rev'g* 308 F. 2d 875 (10th Cir. 1962).

If the equitable claim were heard first, because of the doctrine of collateral estoppel, there would be no right to a jury trial on the issues determined by the court in its determination of the equitable claim. As stated in Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 Harv. L. Rev. 442, 446-447 (1971):

"*Beacon Theatres* thus indicated that whenever principles of former adjudication or law of the case might preclude jury trial on an issue previously litigated before a judge in the same proceeding, the trial judge must, in the absence of exceptional circumstances, order the trial of issues within that proceeding to assure that foreclosure does not occur. But *Beacon Theatres* did not imply that principles of former adjudication should themselves be changed under the influence of the seventh amendment. *Rachal* takes exactly the opposite tack from *Beacon Theatres*, concluding that seventh amendment considerations do influence the application of these principles when reordering is impossible, as it was in *Rachal* because of the separateness of the two proceedings."

In *Beacon Theatres*, where there were legal and equitable claims in one suit and where the court could determine the order of trial of the claims, this Court ordered that the legal claims be heard first. It is only where it is within the

power of the court to avoid preclusion of a jury adjudication of issues common to both legal and equitable claims by scheduling the hearing of those issues by the jury first, that the court should do so.

The court in *Rachal* misinterpreted this learning from *Beacon Theatres* and in an internally inconsistent decision did not preclude re-litigation of the issues determined in the prior action. The *Rachal* court recognized that scheduling was not the issue, *i.e.*, that the legal claims could not be ordered tried to a jury before the equitable claims were tried by a court as those claims were already adjudicated in the prior action brought by the SEC. It also accepted the reasoning of *Beacon Theatres* that an equitable determination would preclude subsequent re-litigation to a jury of factual issues in a legal action, by stating that:

"... if the equitable issues were tried first the doctrine of *res judicata* would most likely preclude further litigation of the same issues in the subsequent proceedings before a jury..." *Rachal*, 435 F.2d at 64.

Inexplicably, the *Rachal* court then stated that it relied upon *Beacon Theatres* in deciding against the plaintiff, and allowed re-litigation, even though it specifically understood *Beacon Theatres* to mean that there would be a preclusion of a subsequent determination as to facts which were determined by a court in a prior proceeding. Thus, *Rachal* reaches a conclusion opposite to the teachings of *Beacon Theatres* while ostensibly relying upon it as precedent. Accordingly, *Rachal* is incorrectly decided and subsequent cases which rely upon *Rachal's* analysis are similarly unsound.

An analysis of the comments on the *Rachal* decision, and the case law prior to and subsequent to that decision, all make it abundantly clear that the Fifth Circuit erred

in not applying the doctrine of collateral estoppel. Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 Harv. L. Rev. 442 (1971). See, *Goldman, Sachs & Co. v. Edelstein*, 494 F. 2d 76 (2d Cir. 1974); *Crane Co. v. American Standard Inc.*, 490 F. 2d 332 (2d Cir. 1973); *In re Transocean Tender Offer Securities Litigation*, 427 F. Supp. 1211 (N.D. Ill. 1977); *Whitman Elec. Inc. v. Local 363, Int. Bro. of Elec. W.*, 398 F. Supp. 1218 (S.D.N.Y. 1974); Note, *Goldman, Sachs & Co. v. Edelstein: The Application of Collateral Estoppel Principles in Derogation of the Right to Jury Trial*, 1974 Duke L.J. 970 (1974); Note, *Right to Jury Trial in Civil Actions—Crane Co. v. American Standard, Inc.*, 490 F. 2d 332 (2d Cir. 1973), 41 Bklyn. L. Rev. 911, 956-958 (1975); Comment, *The Effect of SEC Injunctions in Subsequent Private Damage Actions—Rachal v. Hill*, 71 Col. L. Rev. 1329 (1971).

The decision in *Meeker v. Ambassador Oil Co.*, 375 U.S. 160 (1963) (*per curiam*), adds nothing to Petitioners' argument. *Meeker* simply restates the *Beacon Theatres* teaching that, if in one lawsuit, common issues are present which relate to both legal and equitable claims, the jury must hear the common issues first to avoid the preclusion of a jury trial because of collateral estoppel. In fact, *Meeker* undercuts Petitioners' contentions that a judgment in an equitable proceeding cannot estop re-litigation of the same facts in a subsequent legal action, because were it not for the foreclosure effect of the prior equitable judgment the Court would not have troubled reordering the sequence of the hearings. See, *Katchen v. Landy*, 382 U.S. 323, 336-340 (1966); *Crane Co. v. American Standard Inc.*, 490 F.2d 332, 342 (2d Cir. 1973). As this Court stated in *Katchen v. Landy*, 382 U.S. at 339-340:

"For, as we have said, determination of the preference issues in the equitable proceeding would in any case

render unnecessary a trial in the plenary action because of the *res judicata* effect to which that determination would be entitled. . . . Both *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim." (Emphasis added).

Furthermore, as this Court stated in *Ross v. Bernhard* 396 U.S. 531, 537-538 (1970), referring to the decisions in *Beacon Theatres* and *Dairy Queen*:

"Under those cases, where equitable and legal claims are joined in the same action, there is right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims."

The Second Circuit in *Crane Co. v. American Standard Inc.*, 490 F.2d 332, 342-343 (2d Cir. 1973), subsequently adopted the *Beacon Theatres* reasoning and applied facts, adduced in a prior non-jury proceeding, to a subsequent proceeding involving the same two parties, in which a possible jury trial right existed, stating:

"The very basis of *Beacon Theatres* was that the effect of a trial of the equitable claim 'could be, as the Court of Appeals believed, 'to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damages suit,' for determination of the issue of clearances by the judge might 'operate either by way of *res judicata* or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim.' " 359 U.S. at 504, 79 S.Ct. at 953. *It was to avoid*

this preclusive effect that the Supreme Court directed initial trial of the legal counterclaim. Here the merits of the fraud action had been tried by a judge in equity, without objection or basis for one, and reviewed on appeal. This court's determination in its opinion on appeal stands beyond challenge in the fraud action and precludes relitigation by the parties of all issues resolved there." (Emphasis added).

Accord, Goldman Sachs & Co. v. Edelstein, supra; In re Transocean Tender Offer Securities Litigation supra; Whitman Elec. Inc. v. Local 363, Int. Bro. of Elec. W., supra. Indeed, the Second Circuit recently reiterated the fact that an equitable determination could have preclusive effect on a subsequent legal claim, in *Securities and Exchange Commission v. Commonwealth Chemical Securities*, 574 F.2d 90, 97 (2d Cir. 1978), where it stated:

"As we noted in *Crane v. American Standard, Inc.*, 490 F.2d 332, 342 (2d Cir. 1973), the holding in *Beacon Theatres v. Westover*, 359 U.S. 500, 79 S. Ct. 948, 3 L.Ed. 2d 988 (1959), the *fons et origo* of modern concern over the interplay between the right to jury trial in suits at common law and the lack of such a right in suits in equity, assumed that there would be no jury trial on the plaintiff's claim for an injunction and a declaratory judgment and that a judgment for the plaintiff on these claims would work as a collateral estoppel on the defendant's counterclaim for damages."

The decisions of this Court in *Beacon Theatres* and its progeny make it clear that the doctrine of collateral estoppel precludes re-litigation of issues tried to a court even though, absent that prior litigation, the parties would have been entitled to a jury trial on those issues. Were it not for this preclusive effect, this Court in *Beacon Theatres*

would not have been concerned whether the legal or equitable claims were tried first. Accordingly, the decision below, and not that in *Rachal*, correctly applied this Court's decision in *Beacon Theatres*.

Combining the decision in *Beacon Theatres* with that in *Blonder-Tongue*, it is clear that the Court below decided the instant action correctly in precluding re-litigation of issues determined in the SEC action. By not requiring mutuality, since Petitioners had had a full and fair opportunity to litigate those facts in the SEC action, the Court below properly applied the decision in *Blonder Tongue*. By recognizing that the previously determined equitable claims in the SEC action could not be re-scheduled so as to be heard before the legal claims here, and therefore not requiring a jury trial on those claims, the Court below properly applied the decision in *Beacon Theatres*.

IV.

The observation by the Court below that the Petitioners had failed to protect their right to jury trial was mere dictum and not necessary for the decision below.

The Petitioners expend considerable effort arguing that the Court below held that they had failed to protect their jury trial rights, if any, in the instant action by failing to seek a jury or an advisory jury in the SEC action or to seek an expedited trial of the present action. The Court below did not so hold, but rather raised in dictum the question of waiver of the jury right. Whether the Petitioners waived any right to a jury trial was and is unnecessary to the decision. The Court below so indicated by prefacing its observations on Petitioners' waiver of their jury rights as follows:

"Were there any doubt about the matter, it should in any event be resolved against the defendants in this case for the reason that, although they were fully aware of the pendency of the present suit throughout the non-jury trial of the SEC case, they made no effort to protect their right to a jury trial of the damage claims asserted by plaintiffs . . ." App. p. 14a.

Petitioners were fully apprised of the instant action at the time of the trial in the SEC action and failed to take any steps to preserve or protect any rights they might have had to a jury trial in the instant action. Accordingly, to the extent that they waived jury trial rights in the SEC action, such waiver constitutes a waiver of any rights herein to a trial by jury. The Petitioners suggest (Brief at 30) that the waiver concept should not be applied to them in view of their purported reliance upon *Rachal, supra*. Were there such reliance, it was misplaced since several decisions of the Second Circuit had criticized the holding in *Rachal* and questioned its soundness. This was recognized by the Court below which stated:

"Our disagreement with the Fifth Circuit's decision in *Rachal* should come as no surprise to those familiar with some of our recent decisions bearing on the question present." (App. A, p. 18a).

The instant decision did not, as claimed by the Petitioners, question established authority for the first time. Rather, the holding below was simply another in a line of pronouncements on the matter by the Second Circuit. Accordingly, whatever reliance Petitioners placed on *Rachal* was unfounded and they cannot now use *Rachal* in an attempt simply to get a second trial of issues already fully and fairly aired.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
October Term, 1978
No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and
HERBERT N. SOMEKH,

Petitioners,

—against—

LEO M. SHORE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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This reply brief will answer Respondent's efforts to distinguish several cases relied upon by Petitioners in their main brief, and demonstrate that Respondent's authorities do not support or warrant the denial of a jury trial right to Petitioners in the circumstances presented upon this appeal.

I.

Cases cited by Respondent (Resp. br. pp. 10-13) to evidence the incursion of post-1791 procedures into Seventh Amendment rights do not support his contention. In two of the cases, *Parks v. Ross*, 11 How. 362 (1850) and *Greenleaf v. Birth*, 9 Pet. 292 (1835), no Seventh Amendment claim was asserted or considered. All such cases relate to procedural devices by which the court may control or mod-

ify the actions of juries already empaneled and acting, by directing or setting aside its verdict. The power of a court to set aside or direct a jury verdict does not offend the Seventh Amendment mandate that jury trials be preserved in suits at common law. In *Galloway v. United States*, 319 U.S. 392, *rehearing denied*, 320 U.S. 214 (1943) (Resp. br. pp. 12-13), this Court held, after making specific reference to pre-1791 analogies such as demurrer and motion for a new trial (319 U.S. at 390), that use of the directed verdict did not violate the Seventh Amendment. None of the cited cases considered, no less approved, the denial of a party's right to a jury trial.

In *Dimick v. Schiedt*, 293 U.S. 474 (1935), however, post-verdict procedure of *additur* was held not to meet the constitutional standard, and the Court announced a firm general principle of Seventh Amendment interpretation that post-1791 changes in common law cannot be employed to destroy the right to a jury in actions at common law. The distinction offered by Respondent (Resp. br. pp. 15-17) that *Dimick* was addressed only to the second clause of the Amendment (prohibiting re-examination of jury findings) and not to the first clause, at issue here (the preservation of the jury trial right), is not supported by the Court's opinion. The significance of *Dimick* lies both in its insistence upon historical inquiry as an indispensable method for determining Seventh Amendment questions and its statement of a basic tenet of Seventh Amendment interpretation:

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Compare *Patton v. United*

States, 281 U.S. 276, 312, 74 L.ed. 854, 869, 50 S. Ct. 253, 70 A.L.R. 263." 293 U.S. at 486.

Respondent's brief (pp. 17-18) points also to the fact that four Justices dissented from the majority opinion in *Dimick*. It should be noted that notwithstanding its disagreement with the majority holding, Justice Stone's dissenting opinion in *Dimick* belies Respondent's contention (Resp. br. p. 17) that the second clause of the Seventh Amendment is accorded greater protection than the first; the dissent would have approved the *additur* procedure as a permissible post-verdict mechanism but would have disapproved changes in the essential right of a litigant in an action at law to his trial by jury:

"But this Court has found in the Seventh Amendment no bar to the adoption by the federal courts of these novel methods of dealing with the verdict of a jury, for they left unimpaired the function of the jury, to decide issues of fact, which it had exercised before the adoption of the Amendment. Compare *Nashville, C. & St. L.R. Co. v. Wallace*, 288 U.S. 249, 264, 77 L. ed. 730, 737, 53 S. Ct. 345, 87 A.L.R. 1191." 293 U.S. at 492.

Thus, the thrust of *Dimick*, for this appeal from a decision which would deny Petitioners *any* jury trial, is not diluted but left whole by the dissenting opinion.

Respondent (Resp. br. p. 19 n.) wisely declines to defend the observation made by the Court below that *Ross v. Bernhard*, 396 U.S. 531 (1970) "somewhat weakened" the principle of reliance on pre-1791 guidance in Seventh Amendment cases (App. A, pp. 15a-16a). *Ross* in fact reaffirms Seventh Amendment imperatives in light of modern procedures, and is squarely consistent with the earlier

decisions in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). In *Ross*, this Court examined the rule, theretofore consistently applied, that derivative stockholders' actions were creatures of equity jurisdiction and were tried in courts of equity without jury. It analyzed this history in light of the merger of legal and equitable cases under the Federal Rules of Civil Procedure ("Federal Rules"), and concluded that where a corporation would have been entitled at common law to a jury trial of its claim, the Seventh Amendment "preserves" (396 U.S. at 542) the same jury trial right for parties to derivative actions seeking enforcement of such claim. The Court in effect held that the jury trial right inhered in the character of the claim as an action at law, notwithstanding that procedural obstacles (the pre-merger separation of law and equity) prevented implementation of the right until adoption of the Federal Rules. Rather than having "somewhat weakened" the importance of historical inquiry, the decision in *Ross* confirmed it and applied it so as to permit enlargement, not contraction, of the jury trial right.

From the foregoing, it appears that this Court has been consistent in its adherence to the principle of preservation of the Seventh Amendment jury trial right; that the cases cited by Respondent fail to demonstrate any departure from such principle; that *Beacon Theatres* and *Dairy Queen* are clear reaffirmations of the pre-eminence of Seventh Amendment rights, both in the context of the merger provisions of the Federal Rules and generally; and, from *Ross*, that departure from historic jury trial practice may be employed only to preserve and vindicate jury trial rights and not to limit or extinguish them. In this state of the law, no reasonable basis can be perceived

to warrant judicial denial of Petitioners' right to a jury trial in the instant class action.

In one decision, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) approved the application of the doctrine of estoppel in the absence of mutuality when asserted *defensively*, to avoid redundant litigation of the validity of a patent, and expressly reserved issues affecting use of the doctrine *offensively*. 402 U.S. at 330. In this case, Respondent has sought to employ, *offensively*, an estoppel based on a non-jury finding in a Securities and Exchange Commission ("SEC") injunction action to which Respondent was not a party and in which no injunction was granted, so as to prevent Petitioners from litigating its defenses in this class action, which was commenced a year and a half prior to the institution of the SEC action. Justice Black, in *Beacon Theatres*, stated that:

"[O]nly under the most imperative circumstances, which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims. See *Leimer v. Woods* (CA 8 Mo) 196 F. 2d 828, 833-836. As we have shown, this is far from being such a case." 359 U.S. at 510-511.

No circumstances and surely no imperative circumstances, are presented here as would warrant the extension of *Blonder-Tongue* to this case and the loss of Petitioner's Seventh Amendment right to a jury trial.

II.

In *dictum*, the Court below stated that Petitioners had waived their right to a jury trial (App. A, p. 14a). Such waiver was not claimed by Respondent in the Court below,

nor argued in his brief to this Court. Accordingly, Petitioners do not argue the error of the statement.

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No. 77-1305

Supreme Court, U. S.
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OCTOBER TERM, 1978

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v.

LEO M. SHORE

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF FOR THE UNITED STATES AND THE
SECURITIES AND EXCHANGE COMMISSION
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and
HERBERT N. SOMEKH, PETITIONERS

v.

LEO M. SHORE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE
SECURITIES AND EXCHANGE COMMISSION
AS AMICI CURIAE

QUESTION PRESENTED

Whether petitioners are entitled to a jury trial to relitigate questions decided adversely to them in an injunctive proceeding brought by the Securities and Exchange Commission.

(1)

INTEREST OF THE UNITED STATES AND THE SECURITIES AND EXCHANGE COMMISSION

The United States has an interest in the expeditious and consistent resolution of private actions seeking redress for violations of federal laws, and the Commission has such an interest concerning the securities laws in particular. As this Court recently reaffirmed in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 444, private suits help to achieve the remedial purposes of the securities laws, and they are necessary supplements to Commission action. See also *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381-383; *J. I. Case Co. v. Borak*, 377 U.S. 426, 430-433.

Nonetheless, private litigation to enforce federal statutes imposes significant costs on both the parties and the judicial system. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741-744. Although the volume of private securities litigation is small compared with other filings, many securities cases are quite complex.¹ The efficient enforcement of the laws

¹ From 1973 through 1977, securities and commodities litigation in the federal courts represented between 1.5 percent and 2.3 percent of the total number of civil actions filed per year. During that same period, securities and commodities cases represented between 6.95 percent and 9.84 percent of the civil actions that had been pending in the district courts for three years or more. In addition, while only a small percentage (between .39 percent and .59 percent) of civil cases required 20 days or more for trial, approximately five times as many securities and commodities cases (between 1.4 percent and 3.28 percent) required more than 20 days for trial. Fully 13 percent of the civil trials lasting 20 days or longer

that the Commission and other federal agencies are charged with administering can be promoted through the application of the collateral estoppel doctrine.² Collateral estoppel could both reduce the cost of private litigation and increase the effectiveness of judgments obtained in actions brought by the Commission and other federal agencies.³

The Commission and the United States have a further interest here because the court of appeals indicated that petitioners might have protected their right to a jury trial by obtaining a stay of the injunctive action brought by the Commission. If Commission injunctive proceedings were suspended pending the outcome of private damage actions, or if it were necessary to empanel juries in such proceedings, the Commission's ability to obtain prompt injunctive relief to protect the public against securities law

were in securities or related actions. The statistical appendix to this brief sets out the pertinent data. See also *Manual for Complex Litigation* § 0.22 (1977).

² The United States has previously expressed its interest in the fair and effective use of collateral estoppel in private litigation under the federal patent laws by supporting, as *amicus curiae*, the relaxation of the mutuality doctrine in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313.

³ Several federal agencies have the authority to seek injunctions to enforce the statutes they administer, and many of those statutes also can be enforced by private damage actions. See, e.g., *Allen v. State Board of Elections*, 393 U.S. 544, 556-557 (Voting Rights Act of 1965); *Stewart v. Travelers Corp.*, 503 F.2d 108 (C.A. 9) (Consumer Credit Protection Act of 1968). Cf. *Regents of the University of California v. Bakke*, No. 76-811, decided June 28, 1978, slip op. 11-14 (opinion of Stevens, J.) (Title VI of the Civil Rights Act of 1964).

violations would be seriously impaired. Other federal agencies with the authority to seek injunctions also could be prevented from securing expeditious relief against ongoing violations of their statutes.

STATEMENT

This class action was commenced in November 1974 by respondent, a shareholder of petitioner Parklane Hosiery Company ("Parklane"). Respondent alleged that Parklane and 12 of its officers, directors, and stockholders had issued a materially false and misleading proxy statement, in violation of Sections 14(a), 10(b), and 20(a) of the Securities Exchange Act of 1934, 48 Stat. 895, 891, 899, as amended, 15 U.S.C. 78n(a), 78j(b), and 78t(a), and various rules and regulations promulgated by the Commission.

Respondent's grievances grew out of a merger, which had converted Parklane into a privately owned company controlled by the defendants. The defendants caused a proxy statement to be sent to Parklane's stockholders advising them that, on October 14, 1974, there would be a meeting to consider the merger proposal. After that meeting, the merger was consummated and each of the minority shareholders, including respondent, received \$2 per share for his holdings, subject to dissent and appraisal rights under New York law (Pet. App. 3a).

The amended complaint (App. 25a-37a) alleged that the proxy statement issued to the shareholders was false and misleading in the following respects:

1. the statement set forth reasons why Parklane should be merged into a privately-held company without disclosing that the overriding purpose of the merger was to allow petitioner Somekh (Parklane's president) to meet his personal obligations through salary increases and other transactions that would occur after the closing of the merger,
2. the statement made assertions about the purported termination of negotiations with the Federal Reserve Board for cancellation of a lease held by Parklane, without disclosing that there were ongoing negotiations that could result in substantial financial benefits to Parklane, and
3. the statement asserted that Parklane had retained two expert appraisers, who determined that the fair value of Parklane stock prior to the offer was \$2 per share, without disclosing that the appraisers had not been furnished with sufficient information to prepare an accurate evaluation.

The complaint sought damages, rescission of the merger, and recovery of costs (App. 36a-37a).

In May 1976, before this private action was ready for trial, the Securities and Exchange Commission filed suit seeking an injunction against petitioners. The Commission alleged that the proxy statement issued by Parklane was materially false and misleading in essentially the same respects as those alleged in the private action (Pet. App. 4a).⁴ After a four-day

⁴ After the filing of the Commission's proceeding, respondent amended his complaint in the private action to conform to the Commission's complaint (App. 24a-37a).

trial in which petitioners had ample opportunity to introduce evidence and cross-examine witnesses called by the Commission, the district court held that the proxy statement violated Section 14(a) of the Act and Rule 14a-9 thereunder, 17 C.F.R. 240.14a-9.⁵ The district court found that the proxy statement (1) failed to disclose that the “‘overriding purpose for the merger was to enable [petitioner] Somekh to repay his personal indebtedness,’” (2) falsely represented that “‘no negotiations’” were taking place with the Federal Reserve Board with respect to the cancellation of Parklane’s lease when in fact such negotiations had resumed and were likely to result in substantial financial benefits to Parklane, and (3) failed to disclose that the expert appraisers had not been informed of facts pertinent to their evaluation of Parklane’s shares. *Securities and Exchange Commission v. Parklane Hosiery Co.*, 422 F. Supp. 477 (S.D. N.Y.). The district court further found that each of the foregoing misstatements or omissions was

⁵ Rule 14a-9 provides in pertinent part:

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

“material” under the standard established in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438.⁶ The court of appeals affirmed, agreeing with the judgment of the district court, and specifically upholding each of the district court’s findings and its conclusions regarding materiality. 558 F.2d 1083.

Respondent then moved for partial summary judgment against petitioners (App. 53a), asserting that the findings and conclusions of the district court in the injunctive proceeding collaterally estopped them from relitigating the same issues. The district court denied that motion (Pet. App. 26a), relying on *Rachal v. Hill*, 435 F.2d 59 (C.A. 5), certiorari denied, 403 U.S. 904.

On interlocutory appeal under 28 U.S.C. 1292(b) (see App. 55a-57a), the court of appeals reversed. It held that the doctrine of collateral estoppel barred petitioners from relitigating the questions resolved against them in the enforcement action; it also held that the Seventh Amendment does not require a jury trial of those questions in the circumstances of this case (Pet. App. 7a-19a). The court stated that “the Seventh Amendment preserves the right to a jury trial only with respect to issues of fact, [and] once those issues have been fully and fairly adjudicated in a prior proceeding, nothing remains for trial, either with or without a jury” (Pet. App. 9a).

⁶ The district court declined to grant permanent injunctive relief against the defendants in the enforcement action, but it ordered them to correct various misstatements in documents previously filed with the Commission (Pet. App. 6a).

SUMMARY OF ARGUMENT

I

Because petitioners have had the opportunity fully and fairly to litigate the questions decided adversely to them in the prior injunctive proceeding, the doctrine of collateral estoppel bars them from relitigating those questions. The interests of finality, certainty, and economy of judicial resources preclude further litigation, even though one of the parties in the present case was not a party in the earlier suit. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313.

The principles expressed in *Blonder-Tongue* are applicable whether the plaintiff or the defendant seeks to relitigate questions that have been resolved in a trial that was fair and adequate. Relitigation involves a waste of private and public resources. This is especially true in private securities cases, which tend to be protracted in both their trial and pretrial stages. It is inappropriate, in the absence of circumstances demonstrating actual unfairness, to afford litigants duplicate trials in federal court on questions previously adjudicated.

II

The Seventh Amendment is not a barrier to the application of collateral estoppel in this case. Collateral estoppel does not deny any party the right to trial by jury, because a jury is necessary only to determine those issues about which there is a genuine factual dispute. Where factual issues have been re-

solved in a prior judicial proceeding in which the party subject to estoppel has had a full and fair opportunity to litigate such issues, there is no further fact-finding function for the jury to perform. This Court's decision in *Katchen v. Landy*, 332 U.S. 323, confirms that where, as here, a factual determination has been made by a court of equity pursuant to a statutory scheme requiring a prompt hearing by that court, the doctrine of estoppel may be applied without infringing the Seventh Amendment. The approach in *Katchen* is supported by the common law practice in 1791. In 1791 it was well settled, in both England and the United States, that equitable determinations could collaterally estop relitigation in subsequent actions at law.

It makes no constitutional difference that the doctrine of "mutuality of estoppel" prevailed in 1791 but since has been eroded. This Court has held repeatedly that the adoption of new procedural rules, which merely serve to remove from the jury's domain those questions about which there is no genuine controversy, do not impair Seventh Amendment rights. Thus, the grant of summary judgment or a directed verdict under modern procedural rules, unknown in 1791, has been upheld because "[t]he [Seventh] Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing." *Galloway v. United States*, 319 U.S. 372, 390-391. Here,

as in *Colgrove v. Battin*, 413 U.S. 149, 157, “‘[n]ew devices may be used to adapt the ancient institution [of trial by jury] to present needs and to make of it an efficient instrument in the administration of justice.’”

We are concerned, however, by the court of appeals’ indication that a defendant in a Commission injunctive proceeding may be entitled to a trial by jury, or to a stay of the injunctive proceeding pending the outcome of private litigation, so that the defendant will enjoy the maximum opportunity to have a jury resolve factual disputes before an equity court does so. As we demonstrate at pages 26-30, *infra*, the Commission’s injunctive proceedings are equitable in nature, and the defendant cannot obtain a jury trial in them. Congress has provided, moreover, that unless the Commission consents such proceedings may not be consolidated or coordinated with private litigation.

ARGUMENT

I

PETITIONERS MAY NOT RELITIGATE ISSUES THAT HAVE BEEN DETERMINED ADVERSELY TO THEM AFTER A FULL AND FAIR TRIAL IN THE COMMISSION’S ENFORCEMENT PROCEEDING

Petitioners object (Br. 17-21) to the application of collateral estoppel to preclude relitigation of the question whether their omissions were materially misleading. This objection, however, seems to have little to do with the doctrine of “mutuality” or with the difference between “offensive” and “defensive” collateral

estoppel. Petitioners concede, for example, that collateral estoppel would apply if they had a jury trial in the Commission’s injunctive action or if they had had an opportunity for a jury trial in that action (Br. 14 n. *, 25-26 and n.*). It must be, therefore, that petitioners’ objections revolve entirely around the Seventh Amendment. We believe, however, that arguments that would allow relitigation here, even if there had been an opportunity for a jury trial in the Commission’s action, would be incorrect.

There are many issues in common between this case and the injunctive proceeding. Both complaints challenged the same misrepresentations and omissions in Parklane’s proxy statement; both alleged that those omissions and misrepresentations were “material” (Pet. App. 7a). Petitioners do not dispute the conclusion of the court of appeals that they “were accorded a full and fair opportunity to try those issues in the prior proceeding” and were fully aware of the pendency of the private action while they were vigorously litigating the common issues (*id.* at 7a, 14a-15a). “The interests of finality, certainty and economy of judicial resources” (*id.* at 9a) consequently preclude further litigation on those questions.

Collateral estoppel prevents repetitious litigation on questions “distinctly put in issue and directly determined by a court of competent jurisdiction.” *Parmar Corp. v. Paramount Corp.*, 347 U.S. 89, 101 n. 7.¹

¹ Collateral estoppel applies when “the very fact or point now in issue was, in the former action, (1) litigated by the parties; (2) determined by the tribunal; and (3) necessarily

Although early decisions of this Court declined to apply the doctrine of collateral estoppel unless both of the parties (or their privies) were bound by the judgment in the prior case, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, established that an issue may be precluded, despite lack of mutuality, where the party subject to estoppel had a full and fair opportunity to litigate the questions raised.

This Court recognized in *Blonder-Tongue* that it is not tenable "to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." *Id.* at 328. The Court stressed "the goal of limiting relitigation of issues where that can be achieved without compromising fairness in particular cases" (*ibid.*), and it described the touchstone for applying the doctrine of collateral estoppel in the following terms (*id.* at 329):

Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.

The principle of *Blonder-Tongue* is applicable "offensively," at the instance of a plaintiff, just as it can be invoked "defensively," where the party sought to be estopped had an opportunity for a full and fair

so determined." James and Hazard, *Civil Procedure* 563-564 (1977). See also 1B Moore's *Federal Practice* ¶ 0.441[1-2] (1974).

hearing. 402 U.S. at 330 n. 19. See also, e.g., *Johnson v. United States*, 576 F.2d 606 (C.A. 5); *Zdanok v. Glidden Co.*, 327 F.2d 944, 954-956 (C.A. 2) (Friendly, J.); *United States v. United Air Lines, Inc.*, 216 F. Supp. 709, 725-729 (D. Nev.), affirmed in relevant part, 335 F.2d 379, 404 (C.A. 9); *Garcy Corporation v. Home Insurance Co.*, 496 F.2d 479, 483 (C.A. 7); *Humphreys v. Tann*, 487 F.2d 666, 669-671 (C.A. 6).⁵

Although there may be situations in which "offensive" use of collateral estoppel by someone who was not a party to the first case would be undesirable, this is not such a case.⁶ In litigation brought by the government, where the defendant knows there is or will be private litigation as well, the outcome of the

⁵ See James and Hazard, *supra*, at 582: "Most courts which have repudiated the mutuality rule now appear ready to apply the rule of issue preclusion either offensively or defensively, if the circumstances do not make it inequitable to do so." Accord: ALI, *Restatement (Second) of Judgments* § 88 and Reporter's Note (Tent. Draft No. 2, 1975). See also Comment, *The Use of Government Judgments in Private Antitrust Litigation*, 43 U. Chi. L. Rev. 338, 345-354 (1976); Vestal, *Res Judicata/Preclusion* 317-322 (1970).

⁶ For example, if the stakes in the first litigation were so low that the parties did not have an incentive to try the case fully, there might be an unusually large likelihood that the first decision was wrong, and rules of civil procedure should not perpetuate results that are likely to be incorrect. See Posner, *Economic Analysis of Law* 454-455 (2d ed. 1977). But when the first proceeding was fully contested—and when the parties in the first action knew that the other suit was pending or likely to be brought—then there is no reason to think that a second litigation would produce results more accurate than those of the first.

trial "represents the closest approximation to objective certainty possible in litigation." Comment, *The Use of Government Judgments in Private Antitrust Litigation*, 43 U. Chi. L. Rev. 338, 350-351 (1976). Such defendants have ample incentive to litigate the issue fully in whatever proceeding first goes to judgment. Petitioners litigated fully in the Commission's suit. Their argument against collateral estoppel therefore must be that despite full litigation, and despite the detailed findings of the district judge and the three appellate judges in the first case, they should have an opportunity to try the same factual issues again with more fact finders. That argument fails when tested by the standards of *Blonder-Tongue*.

Some commentators have expressed concern that, if plaintiffs who are not bound by the first judgment may invoke collateral estoppel "offensively," those plaintiffs would "sit on the sidelines" in the first action knowing that they can reap the fruits of victory without taking the consequences of defeat. Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 Colum. L. Rev. 1457, 1473 (1968). Private plaintiffs, however, must "sit on the sidelines" during the Commission's injunctive actions, because Congress has determined that their disposition should not be delayed by intervention. See the 1934 Act, 15 U.S.C. 78u(d); *Securities and Exchange Commission v. Everest Management Corp.*, 475 F.2d 1236, 1240 (C.A. 2). See also James and Hazard, *supra*, at 581.

The "mutuality" doctrine was eroded and eventually abolished because it disregarded the costs of

litigating the same issue more than once. The Court remarked in *Blonder-Tongue* (402 U.S. at 334) that the costs of patent litigation may be "staggering" and that patent cases consume "an inordinate amount of trial time" (*id.* at 336-337). The same may be said of securities cases (see note 1, *supra*). There is no general reason to think that the result of a second litigation is fairer or more accurate than the first, and there is no reason for the judicial system to expend time, effort, and money to duplicate proceedings when the prospect of a "better" result is no more than a shadow. Here, as in *Blonder-Tongue*, it is important to conserve judicial resources—and the resources of the parties—by curtailing relitigation.

Amicus Washington Legal Foundation argues (Br. 7-8), however, that allowing parties who are not bound by the first judgment to take advantage of it will coerce defendants to settle injunctive proceedings. In other words, *amicus* argues that the collateral estoppel rules will affect the outcome of the first proceeding in a way that makes that outcome less fair and less likely to be accurate. If this were so, it would be a serious objection to the position we take here. But the contention of *amicus* does not withstand scrutiny.

The argument of *amicus* hinges on the supposed unfairness of pressures that make settlement more attractive. This Court, however, often has expressed the view that there is a strong public interest in the

settlement of litigation,¹⁰ and if the application of collateral estoppel makes settlement more attractive that would be an argument in its favor. Moreover, most injunctive actions brought by the Commission already are settled,¹¹ and it seems unlikely that the application of collateral estoppel principles would cause any additional settlements to be unfair or coercive. What is more, private securities actions often involve issues that are not litigated in actions brought by the Commission. For example, issues such as whether the misrepresentation caused damages, whether it was relied on, and the quantum of damages are raised only in private actions, as Congress has recognized. See S. Rep. No. 94-75, 94th Cong., 1st Sess. 76 (1975). A defendant's decision to litigate against the Commission, therefore, does not guarantee that every private plaintiff could ride the Commission's coattails. Because of the difference in issues, it is unlikely that defendants in injunctive actions will be unfairly affected by the prospect of collateral estoppel.

¹⁰ See, e.g., *Williams v. First National Bank of Pauls Valley*, 216 U.S. 582, 595; *St. Louis Mining and Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 656.

¹¹ Approximately 89 percent of the defendants named in the Commission's injunctive actions between October 1, 1976, and September 30, 1977, settled their cases. (A search of the Commission's files revealed that 641 of the 715 defendants during this period chose to settle.) During this time *Rachal v. Hill*, *supra*, was the only appellate case dealing with the relationship between the Seventh Amendment and collateral estoppel in private suits following the Commission's injunctive actions.

Even if the issues in the Commission's suit and the private litigation were identical, however, it would not follow that recognition of collateral estoppel would lead to any "coercion" to settle. Any form of collateral estoppel—offensive or defensive, mutual or non-mutual, with or without a jury trial in the first proceeding—may raise the stakes of litigation by allowing a single litigation to influence the result in more than one case. This should not cause any party to be under unfair pressures in the first litigation. To the contrary, when the stakes of litigation increase, the parties simply have greater incentive to discover the facts and investigate the legal arguments; the investment necessary to make the disposition of the first litigation as fair and as accurate as possible might be infeasible in litigation involving small stakes. Suppose that a full litigation in a securities case would cost the defendant \$100,000. If the stakes of the suit are small the defendant is unlikely to invest the time and money necessary to litigate the questions fully; he may be pressured, by litigation costs alone, to settle. But if the stakes are substantial, it is much more attractive for the defendant to litigate the case as fully as possible in an attempt to prevail outright.¹² Moreover, if a case with significant stakes proceeds to trial, the importance of the decision will ensure that the issues are litigated vigorously, thus

¹² The parties' decision to litigate rather than to settle also depends on their attitudes toward risk and their assessments of the probability of prevailing after trial. See Posner, *supra*, at 434-441.

increasing the reliability of the decision and strengthening the argument for invoking that decision in subsequent cases.

II

THE SEVENTH AMENDMENT DOES NOT REQUIRE A JURY TRIAL OF ISSUES FULLY LITIGATED IN A PRIOR CASE

The Seventh Amendment does not require a jury to try every issue in civil litigation. There is no need for a jury in equitable suits. In suits at law there is no need for a jury unless there is a genuine dispute concerning a material fact. *Galloway v. United States*, 319 U.S. 372. The right to a jury may be forfeited if not asserted expeditiously. Fed. R. Civ. P. 38. Petitioners concede that there is no need for a jury in a second trial if there either was or could have been a jury in the first trial (see Pet. Br. 14 and n. *, 25-26 and n. *). Indeed, to argue that there must be a jury in every proceeding is to argue for the abolition of *res judicata* and collateral estoppel. Petitioners do not venture so far. But there is no sound reason to make the collateral estoppel effects of judgments depend on whether there could have been a jury in the first proceeding. The Seventh Amendment permits a party to insist that a jury resolve certain disputed factual issues in actions at law, but it does not require the legal system to treat particular issues as open to factual dispute. Collateral estoppel removes particular issues from the class of issues open to dispute, and its scope therefore does not depend on the availability of a jury in the first trial.

A. The Common Law Incorporated by the Seventh Amendment Recognizes the Collateral Estoppel Effect of Prior Equitable Determinations

The decisions of this Court establish that "the thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791 * * *" (*Curtis v. Loether*, 415 U.S. 189, 193), and that trial by jury is available in federal suits involving "rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty" (*Pernell v. Southall Realty*, 416 U.S. 363, 375). But it is equally clear that the Seventh Amendment "did not purport to require a jury trial where none was required before." *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 459. The common law has long recognized that estoppel bars relitigation in courts of law of questions previously decided in courts of equity, and that principle determines the availability of jury trials.

The common law in 1791 recognized that issues tried before the equity chancellor need not be relitigated before a jury. See *Hopkins v. Lee*, 6 Wheat. 108, 112, summarizing this long-established rule in England and the United States. See also *Smith v. Kernochen*, 7 How. 198, 217-218; *Brady v. Daly*, 175 U.S. 148, 158-159; and Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 Harv. L. Rev. 442, 448-458

(1971), which demonstrate acceptance of this principle on both sides of the Atlantic prior to 1791.¹³

In light of this established rule, the Court concluded in *Katchen v. Landy*, 382 U.S. 323, 337-339, that equitable judgments have estoppel effects in actions at law. *Katchen* held that a bankruptcy court, sitting as a statutory court of equity, could dispose of a trustee's objection to the claim of a creditor, even though issues concerning the objection otherwise would have been litigated before a jury. The Court recognized that acceptance of the creditor's Seventh Amendment objection to this procedure would not be "consistent with the equitable purposes of the Bankruptcy Act nor with the rule of *Beacon Theatres* [v. *Westover*, 359 U.S. 500] and *Dairy Queen* [v. *Wood*, 369 U.S. 469] which is itself an equitable doctrine." 382 U.S. at 339. This meant that some factual issues would never be tried by a jury, but, as the Court later observed in *Atlas Roofing, supra*, 430 U.S. at 458, "whether a fact would be found by a jury [always has] turned to a considerable degree on the nature of the forum in which a litigant found him-

¹³ Treatise writers summarizing the common law rule have pointed out that "[i]n that large class of actions in which the jurisdiction in equity and at law is concurrent, an issue determined in either tribunal is [conclusive] in the other." 2 Van Fleet, *Former Adjudication* 682 (1985). The *Restatement (Second) of Judgments* § 68, comment J (1942), reiterated the common law rule as follows: "Where in a proceeding in equity a question of fact is actually litigated and determined by a valid and final decree, the determination is conclusive between the parties in a subsequent proceeding either at law or in equity on a different cause of action."

self." If by chance the litigant first found himself in an equity court, as in *Katchen*, the essential facts would be found there. Then there would be nothing left for a jury to do in any subsequent suit involving the same facts.

The rationale of *Katchen* applies in this case as well. The Commission's proceeding in equity in the present case, which resulted in the findings and conclusions which give rise to collateral estoppel, was brought pursuant to Section 20(b) of the Securities Act of 1933, 48 Stat. 86, as amended, 15 U.S.C. 77t(b), and Section 21(d) of the Securities Exchange Act of 1934, 48 Stat. 900, as amended, 15 U.S.C. 78u(d). Here, as in *Katchen*, a specific statutory scheme requires the prompt resolution of factual issues in a court of equity. Once the facts have been found, there is no reason to find them again in another forum. *Katchen* holds at least that the Seventh Amendment allows a court of law to give collateral estoppel effect to the decision of the equitable tribunal.¹⁴ Thus the fact that petitioners *could not* have

¹⁴ In other contexts, similar principles have accommodated government enforcement of a federal statute and related private litigation. For example, although a plaintiff claiming treble damages under the antitrust laws has a right to trial by jury in any judicial proceeding, certain issues of fact may be determined by an administrative agency and need not be relitigated in the district court (*Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 306). An argument that this procedure "amount[s] to a deprivation of * * * Seventh Amendment rights" (*Deaktor v. L.D. Schreiber & Co.*, 479 F.2d 529 (C.A. 7)) was rejected by this Court. *Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113, 115.

obtained a jury trial in the injunctive action does not assist them here.

B. It is Not Material that Respondent Was Not a Party to the Equity Action

1. If, as *Katchen* holds, facts found in an equitable proceeding are conclusive in a later action at law even though there could not have been a jury in the equitable proceeding, then petitioners can prevail here only if *Katchen* depended on the "mutuality" doctrine. But petitioners do not suggest any reason why the Seventh Amendment issue should depend on the identity of their opponent in the first trial. No matter who the opponent was, it is true that facts were found, without a jury, in a proceeding that gave petitioners a full opportunity to litigate. Those facts being settled, as *Katchen* establishes, there are no facts for a jury to find. The rules of mutuality of estoppel simply have nothing to do with Seventh Amendment principles.

Moreover, the Seventh Amendment did not "freeze equity jurisdiction as it existed in 1789" (*Atlas Roofing, supra*, 430 U.S. at 459), and that amendment "was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases" (*id.* at 460). There has always been room for procedural changes, such as the abolition of the mutuality rule, that affect when (if at all) a jury is needed to find facts. The Court consistently has upheld innovations that define the nature of disputed issues and remove from the jury's domain certain issues about which there is no genuine dispute.

Galloway v. United States, 319 U.S. 372, 388-393, illustrates this process. A new rule of federal procedure enabled a judge to direct a verdict for a party after hearing evidence. The losing party argued that this procedure unconstitutionally transferred to the court a decision that the Seventh Amendment left to the jury. This Court rejected that argument, reasoning (*id.* at 390-391):

The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were the 'rules of the common law' then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system.

The Court also noted that the Seventh Amendment does not compel "endless repetition of litigation and unlimited chance, by education gained at the opposing party's expense, for perfecting a case at other trials." *Id.* at 392-393. See also *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 497-498 (retrial limited to question of damages comports with Seventh Amendment); *Ex parte Peterson*, 253 U.S. 300, 309-311; *Souffront v. Compagnie Des Sucreries*, 217 U.S. 475, 487 (*res judicata* does not offend the Seventh Amendment because, when one decision has resolved a controversy, no issue remains for jury trial); *Fidelity & Deposit Co. v. United States*, 187

U.S. 315, 319-321 (summary judgment procedures comport with Seventh Amendment because they simply determine when there is no federal dispute for a jury to resolve).

These cases establish that new procedural rules comply with the Seventh Amendment—even if they curtail the scope of jury trials—when they do no more than determine whether there is a genuine factual issue for jury resolution. The cases also demonstrate that “[n]ew devices may be used to adapt the ancient institution [of trial by jury] to present needs and to make of it an efficient instrument in the administration of justice.” *Colgrove v. Battin*, 413 U.S. 149, 157. These and similar decisions fully support the assessment of Professors Shapiro and Coquillette, *supra*, 85 Harv. L. Rev. at 454-456, that:

There are * * * affirmative reasons for rejecting [the argument] based on the law of mutuality as it stood in 1791. First, it would reduce the historical inquiry to an absurdity. Since mutuality is only one aspect of the broader doctrine of *res judicata*, would it not follow from acceptance of the defense that the precise boundaries of the entire doctrine as of 1791 would have to be marked? That, for example, developments in the doctrine with respect to ‘privity,’ ‘finality,’ the meaning of a judgment ‘on the merits,’ the distinction between ultimate and mediate facts, etc. would all have to be given fixed dates of birth before it could be decided whether a judgment in equity precludes relitigation at law? Even the hardest antiquarian would, and should, blanch at the prospect of such an undertaking.

* * * If collateral estoppel is otherwise warranted, the jury trial question should not stand in the way.

The prior injunctive proceeding settled some of the issues raised by the complaint in this private damage action. As to those issues, there is no longer a genuine dispute requiring jury determination. Thus, the question whether the proxy statement contained misrepresentations and omissions has been determined, and the question whether those defects were “material” in nature has also been determined. But, as respondent appears to concede (Br. 26), some disputed issues remain for jury resolution in this case; those issues may include causation, reliance, and damages.¹⁵ Collateral estoppel narrows the issues here but does not obviate the need for a jury trial. The decision of the court of appeals in this case leaves open for initial determination in the district court the scope of collateral estoppel; it is appropriate for that court to determine in the first instance what issues remain for trial before the jury.

¹⁵ As this Court emphasized in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 386-390, the plaintiff in a private action under the proxy rules is not entitled to relief simply because the proxy solicitation contained material misrepresentations or omissions. And, as this Court has made clear, “damages should be recoverable only to the extent that they can be shown.” The Second Circuit has held that an injunctive proceeding brought by the Commission will not have a preclusive effect where additional questions have not been adjudicated. *Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 96 n. 4.

2. Petitioners avoid most of our arguments. In their view, this Court already has held that decisions in an equitable proceeding cannot preclude later consideration of the same issues by a jury. But the cases on which petitioners rely—*Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469—hold only that where both legal and equitable claims are “presented in a single case” (369 U.S. at 472), a trial by jury is required on all factual issues involved in a common law cause of action. The cases establish a rule for the sequence of litigation within one case. As the court of appeals observed (Pet. App. 10a-13a), those cases support the result here because the Court assumed that a prior determination in equity without a jury would be preclusive in later proceedings at law. Unless the decision in equity would have a collateral estoppel effect, there would have been no reason to require a particular order of proof. *Shapiro and Coquillet*, *supra*, 85 Harv. L. Rev. at 445-448. *Katchen*, which was decided after *Beacon Theatres* and *Dairy Queen*, confirmed what the Court had assumed. See pages 19-21, *supra*.

Petitioners’ reliance on *Dimick v. Schiedt*, 293 U.S. 474, fares no better. *Dimick* held that *additur* (an increase by the judge of the amount of damages awarded by the jury) violates the Seventh Amendment because the common law “forbade the court to *increase* the amount of damages” (293 U.S. at 482). *Dimick* had nothing to do with rules that identified

the issues in dispute and thus established the scope of the jury’s function. It involved the second clause of the Seventh Amendment (“no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law”), while the present case involves the first clause. Collateral estoppel does not involve “re-examination” of the verdict of a jury. At all events, for the reasons discussed at pages 18-19, *supra*, the common law supports the application of collateral estoppel even when that doctrine limits the issues triable to a jury.

C. Concern About Jury Trials Does Not Authorize A
Court To Stay Injunctive Proceedings Brought By
The Government

The court of appeals stated (Pet. App. 14a):

Were there any doubt about the [question whether there is a need for a jury to resolve issues otherwise subject to collateral estoppel] it should in any event be resolved against the defendants in this case for the reason that, although they were fully aware of the pendency of the present suit throughout the non-jury trial of the SEC case, they made no effort to protect their right to a jury trial of the damage claims asserted by plaintiffs, either by seeking to expedite trial of the present action or by requesting Judge Duffy, in the exercise of his discretion pursuant to Rule 39(b), (c), F. R. Civ. P., to order that the issues in the SEC case be tried by a jury or before an advisory jury. [Footnote omitted.]

The court of appeals apparently saw this comment as implementing the concern expressed in *Beacon Theatres* and *Dairy Queen* that equity actions not needlessly precede legal actions in a way that reduces the issues triable to juries. We believe, however, that *Katchen* disposes of these concerns and that the court of appeals' *dicta*, if adopted by this Court, would diminish the effectiveness of the Commission's actions without producing any benefits to the public or to litigants.¹⁶

The Commission's action was authorized by two statutes (see page 20, *supra*). The remedies available to the Commission are equitable, and neither Act provides for a jury trial in proceedings instituted by the Commission. This Court repeatedly has recognized that a litigant is entitled to a jury trial only if the case is of the type traditionally brought in an action at law. See, e.g., *Pernell v. Southall Realty*, *supra*. An action by the Commission under the federal securities laws "was not known at common law. And if it had been, it would have been one at equity." *Bradford v. Securities and Exchange Commission*, 278 F.2d 566, 567 (C.A. 9).¹⁷

¹⁶ Petitioners attack the court of appeals' *dicta* (Br. 27-32), and respondent does not attempt to support the court in this respect (Br. 33-34).

¹⁷ See also *Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 94-97 (C.A. 2); *Securities and Exchange Commission v. Associated Minerals, Inc.*, 75 F.R.D. 724, 725-726 (E.D. Mich.), petition for writ of mandamus denied, C.A. 6, No. 77-1422, decided September 8, 1977; *Securities and Exchange Commission v. Pet-*

This Court has never suggested that suits for equitable relief, such as proceedings brought by the Commission, should be tried before a jury.¹⁸ Indeed, *Atlas Roofing Co.*, *supra*, reaffirmed the principle that only actions at law need be tried to a jury. Any requirement that equitable or administrative actions be tried to a jury could handicap the ability of the courts and administrative agencies to provide prompt and efficient relief in many kinds of cases.

[The Seventh Amendment] did not purport to require a jury trial where none was required before. Moreover, it did not seek to change the factfinding mode in equity or admiralty nor to freeze equity jurisdiction as it existed in 1789, preventing it from developing new remedies

See also *United States v. Louisiana*, 339 U.S. 699, 706; *Shields v. Thomas*, 18 How. 253, 262. And no one—not even the court of appeals—has identified any benefit in empaneling an advisory jury in the Commission's injunctive actions. The advisory jury could delay or complicate the injunctive case (cf. *Muniz v. Hoffman*, 422 U.S. 454), yet it would not bind the court or add anything to the collateral estoppel effect of the decision. See 5 Moore's *Federal Practice* ¶ 39.10

rofunds, Inc., 420 F. Supp. 958, 959-960 (S.D. N.Y.), appeal by defendant dismissed with prejudice, C.A. 2, No. 76-6184, decided April 12, 1977. See also 5 Moore's *Federal Practice*, ¶ 38.24 [1] (1977).

¹⁸ See *Katchen v. Landy*, *supra*, 382 U.S. at 337-339.

where those available in courts of law were inadequate. [430 U.S. at 459.]

[1], p. 730 (1977). See also *Securities and Exchange Commission v. Wills*, CCH Fed. Sec. L. Rep. ¶ 96,321 (D. D.C.); *Securities and Exchange Commission v. Hart*, CCH Fed. Sec. L. Rep. ¶ 96,454 (D. D.C.).

What is more, by adopting Section 21(g) of the Securities Exchange Act of 1934, as added, 89 Stat. 155, 15 U.S.C. 78u(g),¹⁹ Congress has endeavored to prevent delays in the Commission's proceedings that might be caused by parallel private actions. The legislative history of Section 21(g) elaborates the congressional concern:

If not hindered by the possibility of transfer and consolidation with claims of private litigants, [the Commission] is then in a position to seek prompt preventive relief by way of an injunction. To delay the Commission action while administering the pretrial phase of the private actions is to risk leaving the defendants in the Commission's suit free to continue their potentially fraudulent conduct, and thus cause new losses to other investors.

S. Rep. No. 94-75, 94th Cong., 1st Sess. 76 (1975). Accordingly, courts should not require the Commission

¹⁹ Section 21(g) of the Securities Exchange Act provides in part:

Notwithstanding the provisions of section 1407(a) of title 28, United States Code, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

to await the resolution of private actions before advancing to trial in enforcement proceedings, and they should not impose any requirements that might unnecessarily delay trial of the Commission's suits. Private actions, often filed as class or derivative suits, may consume years for pretrial discovery alone. The Commission's ability to protect the public during this period would be seriously impaired if injunctive proceedings were postponed at the request of private litigants or delayed by requests for jury trials. See *Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 96-97 (C.A. 2).

In sum, although we agree with the holdings of the court below, we believe that the court's *dictum* is not a necessary element in its analysis or an appropriate view of the procedures to be used in the Commission's suits.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1978.

APPENDIX

A STATISTICAL PROFILE OF SECURITIES
LITIGATION IN THE FEDERAL COURTSCIVIL CASES FILED IN THE DISTRICT COURTS ¹

| Actions | 1973 | 1974 | 1975 | 1976 | 1977 |
|--|--------|---------|---------|---------|---------|
| Total actions | 98,560 | 103,530 | 117,320 | 130,597 | 130,567 |
| Securities, commodities and exchange actions | 1,999 | 2,378 | 2,408 | 2,230 | 1,960 |
| Securities, commodities and exchange actions as percent of total actions | 2.03 | 2.30 | 2.05 | 1.71 | 1.50 |

¹ Based on the Annual Report of the Administrative Office of the United States Courts for the Twelve Month Period Ended June 30, 1977, Table 11 (1978).

CIVIL CASES PENDING FOR THREE OR MORE YEARS

| Year | Cases pending Three or More Years | SC&E ¹ Cases Pending Three or More Years | SC&E Cases As Percent Of Cases Pending Three Or More Years |
|-------------------|---|---|---|
| 1977 ² | 11,835 | 1,007 | 8.51 |
| 1976 ³ | 9,414 | 834 | 8.86 |
| 1975 ⁴ | 7,563 | 744 | 9.84 |
| 1974 ⁵ | 7,352 | 682 | 9.28 |
| 1973 ⁶ | 7,602 | 528 | 6.95 |

¹ Securities, commodities and exchange actions.

² Annual Report of the Administrative Office of the United States Courts for the Twelve Month Period Ended June 30, 1977, Table 16 (1978).

³ Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1976, Table 22 (1977).

⁴ Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1975, Table 22 (1976).

⁵ Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1974, Table 47 (1975).

⁶ Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1973, Table 28 (1974).

CIVIL TRIALS REQUIRING 20 OR MORE DAYS

| Year | Total Civil Trials | Civil Trials Requiring 20 or More Days | Civil Trials Requiring 20 or More Days as Percent of Total | Total SC&E ¹ Trials | SC&E Trials Requiring 20 or More Days | SC&E Trials Requiring 20 or More Days as Percent of All SC&E Trials |
|-------------------|--------------------------|---|---|--------------------------------------|--|--|
| 1977 ² | 11,604 | 56 | .48 | 321 | 7 | 2.18 |
| 1976 ³ | 11,656 | 69 | .59 | 335 | 11 | 3.28 |
| 1975 ⁴ | 11,603 | 45 | .39 | 353 | 5 | 1.42 |
| 1974 ⁵ | 10,972 | 48 | .44 | 301 | 7 | 2.33 |
| 1973 ⁶ | 10,896 | 54 | .50 | 257 | 6 | 2.33 |
| TOTAL | 56,731 | 272 | | 1,567 | 36 | |

¹ Securities, commodities and exchange actions.

² Annual Report of the Administrative Office of the United States Courts for the Twelve Month Period Ended June 30, 1977, Table C-8 (1978).

³ Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1976, Table C-8 (1977).

⁴ Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1975, Table C-8 (1976).

⁵ Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1974, Table C-8 (1975).

⁶ Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1973, Table C-8 (1974).

MOTION FILED
JUN 15 1978

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. AND
HERBERT N. SOMEKH, *Petitioners*

v.

LEO M. SHORE, *Respondent*

**MOTION OF THE WASHINGTON LEGAL
FOUNDATION FOR LEAVE TO FILE
A BRIEF AMICUS CURIAE AND
BRIEF OF AMICUS CURIAE,
THE WASHINGTON LEGAL FOUNDATION**

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**MOTION OF THE WASHINGTON LEGAL
FOUNDATION FOR LEAVE TO FILE
A BRIEF AMICUS CURIAE**

Washington Legal Foundation, Inc. moves, pursuant to Supreme Court Rule 42, for leave to file the annexed brief *amicus curiae* in the above-captioned proceeding. Consent to the filing of the brief has been withheld by counsel for Leo M. Shore.

The Washington Legal Foundation, Inc. (WLF) is a non-profit, tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 15,000 members, contributors and supporters throughout the United States whose interests the foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF seeks to advance the interests of businesses and to ensure that the civil liberties of businesses are strengthened and preserved.

Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties to this case are primarily concerned with the end results of this lawsuit. None has as its primary concern the issue of the businessman's right to a jury trial. WLF's sole concern in this case is the preservation of the right to a trial by jury and the prevention of the collateral estoppel of that right by a federal agency proceeding.

The growth of the number and magnitude of government agencies is eroding the right to a jury trial in this nation. WLF is seeking to control the unbridled discretion, growth and proliferation of bureaucracy and to preserve the right of citizens and businesses to a jury trial when they are faced with allegations of wrongdoing by government agencies.

Accordingly, Washington Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties to this case are primarily concerned with the end results of this lawsuit. None has as its primary concern the issue of the right to a jury trial. WLF's sole concern in this case is the preservation of the right to a trial by jury and the prevention of the collateral estoppel of that right by a federal agency proceeding.

The growth of the number and magnitude of government agencies is eroding the businessman's right to a jury trial in this nation. WLF is seeking to control the unbridled discretion growth and proliferation of bureaucracy and to preserve the right of citizens and businesses to a jury trial when they are faced with allegations of wrongdoing by government agencies.

ARGUMENT

I. BUSINESSMEN HAVE A CONSTITUTIONAL RIGHT TO A JURY TRIAL IN A CIVIL ACTION BROUGHT UNDER THE FEDERAL SECURITIES LAWS.

Had there been no prior injunctive decision in the courts below petitioners would unquestionably have had a right to a jury trial. *Shore v. Parklane Hosiery Company, Inc.*, 565 F. 2d 815, 824 (2d Cir. 1977); *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied* 403 U.S. 904 (1971).

The Seventh Amendment to the Constitution provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a

jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

To be entitled to a jury trial under this Amendment the suit must be one at common law or in the nature of such a suit. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937).

Although this case is not one at common law it is in the nature of an action at common law. The action below could properly be characterized as one in the nature of assumpsit, a form of action at common law. F. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* (CAMBRIDGE UNIVERSITY PRESS Ed. 1968) 56. Maitland identifies assumpsit as a claim for deceit based on the active misconduct of defendant. The allegations in the court below are closely analogous to an action based on deceit and to the allegedly active misconduct of defendant. Concerning a civil suit brought under the Securities and Exchange Act the Supreme Court stated:

"The injury which a stockholder suffers from corporate action pursuant to a *deceptive* proxy solicitation ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder. The damage suffered results not from the *deceit* practiced on him alone but rather from the *deceit* practiced on the stockholders as a group."

J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (emphasis added).

The factual situation in the *Borak* case, concerning the cause of action, is virtually identical to the instant case. Both cases involved an allegedly misleading proxy statement concerning a proposed merger. Assumpsit,

or deceit, clearly forms the basis for these actions, which is in the nature of an action at common law.

Any doubt as to the availability of a jury trial is to be resolved in favor of that right, as Mr. Justice Black emphasized:

[T]he right to a jury trial is a constitutional one, however, while no similar requirement protects trials by the court

Beacon Theatres v. Westover, 359 U.S. 500, 510 (1959)

Therefore, had there been no prior determination by a Court sitting in equity, doubts about the availability of a jury trial would be resolved in defendants' favor and defendants would have been entitled to a jury trial. Amicus now turns to the question of whether the doctrine of collateral estoppel can override the constitutional requirement of a trial by jury.

II. THE CONSTITUTIONAL RIGHT TO A JURY TRIAL TAKES PRECEDENCE OVER APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL.

The doctrine of collateral estoppel is not found in the four corners of the Constitution of the United States. The Court below held that the doctrine of collateral estoppel should be applied to further the interests of "fairness, finality, certainty, economy in utilization of judicial resources, avoidance of possibly inconsistent results" and the achievement of just, speedy and inexpensive determinations of civil actions. 565 F.2d at 821. None of these interests is protected by the Constitution of the United States. "Economy", "finality" and "inexpensive" are descriptions of expediency which should never be permitted to infringe fundamental constitutional rights.

Amicus suggests that in the interests of "fairness" the doctrine of collateral estoppel should *not* be applied. The reasoning behind the doctrine of mutuality of estoppel should be considered as a basis for *preserving* the constitutional right to a trial by jury.

A. Mutuality of Estoppel.

Although the trend appears to be away from that of applying the doctrine of mutuality of estoppel in general,¹ as it applies to the right to a jury trial the doctrine merits thorough consideration. As applied to the facts of this case mutuality would not exist because Mr. Shore was not a party to the SEC injunction action. Since Mr. Shore was the plaintiff he could exercise significant control over the progress of the case in which he was a party. He could delay the case by discovery or other means for the purpose of allowing the SEC injunction action to be decided or tried first. By doing so Mr. Shore would have the best of both worlds. If the SEC prevailed in their case he could use the doctrine of collateral estoppel to prevail in his case. If the SEC lost Mr. Shore would not be bound by the doctrine since he was not a party in the first case.

Similarly, a potential plaintiff could closely monitor a federal agency's injunction action against a business. If the government prevailed the business would be easy prey to an action based on the theory of collateral estoppel.

One of the reasons behind the theory of mutuality of estoppel is obviously that all parties should have been involved in the earlier proceeding in order to be bound

¹ See *Rachal v. Hill*, *supra*, 435 F.2d at 61, 62.

or advantaged by the later proceeding. There is a fundamental unfairness in allowing a potential litigant to sit on the sidelines while a government agency puts its great weight against a private business.

In any equitable action, when the federal government is on one side and a private company, businessman, or individual on the other, the balance of equities often tips toward the federal government. The reasons for this is two-fold:

1). The federal government is supposedly representing the broad public interest, where the private litigant is supposedly not;

2). The federal government usually has more resources to bring into action in the judicial battlefield than private litigants.

These factors should have no bearing on a later-decided civil action between two private parties. Fundamental fairness dictates that both parties be given equal opportunity to have their day in court.

The effect of the decision below is to unfairly place defendants, who were parties to both an SEC injunction action and a private action based on the same alleged violations of law, in an untenable position if defendants desire to preserve their right to a jury trial. See Brodsky, *The Frustration of Private Counsel: Uncertainties Favor the Commission*, 178 (116) N.Y.L.J. 48 (1977); Mathews and Thompson, *SEC Enforcement Program: Emphasis on Prerequisites Highlights Year's Actions*, 178 (116) N.Y.L.J. 45, 46 (1977). While this case arises in the context of an SEC action the same problems develop in the context of other agency actions. See subsection B, *infra*.

Delay in an SEC enforcement action "to safeguard the public interest" is not tolerated. *Securities and Exchange Commission v. Wills*, [Current Transfer Binder] CCH Fed. Sec.L.Rep. ¶96,321 (D.D.C. 1978). Therefore, a defendant in an SEC action cannot stay that action to enable a related private action to be tried first. Consequently, the defendant faced with an SEC action and a related private action for damages is left with two "choices", either of which would create injustice concerning the constitutional right to a jury trial.

The first "choice" is to contest the SEC action. However, by doing so, according to the Court below, the defendant exposes himself to the risk of an adverse determination which would extinguish his constitutional jury trial right in the private action.

The other choice is to settle the SEC action to avoid a trial and thereby prevent the possibility of an adverse determination. However, to force a defendant to settle one action, in which it has no jury trial right, in order to preserve its constitutional jury trial right in a second action, would be inconsistent with the Seventh Amendment's preservation of that right. Moreover, to place a defendant in such a position is to give the SEC, at a time when its allegations are as yet unproven, unfair and unwarranted leverage in dictating settlement terms to a defendant intent on preserving its jury trial right.

In this regard, the Brodsky article, *supra*, after discussing various areas of uncertainty in SEC litigation, stated:

"Thus, in SEC injunction actions the Commission is now armed with an additional argument in

its powerful array of arguments to persuade targets of investigations to settle with them—namely, that even if no injunction is mandated, the court may issue findings and direct that public disclosure material be corrected. If it does, those findings will be binding, at least in the Second Circuit, in a private action for damages.” Brodsky, *supra*, at 48.

Similarly, the Mathews and Thompson article, *supra*, observed:

“*Shore* on its face is a great boon for class action plaintiffs—at least those who are able to bring their cases in the Second Circuit. The decision may also benefit the SEC’s enforcement program. Potential SEC defendants are less likely to resist settlement and to force the SEC to trial knowing that the strike suitors wanting in the wings will be able to ride the coattails of the SEC’s substantial trial preparation and presentation efforts.” Mathews and Thompson, *supra*, at 46.

In summary, the decision below places defendants in private actions under the federal securities laws in a positions which either does violence to their Seventh Amendment jury trial right or may force them to refrain from contesting allegations they deny in related SEC enforcement actions.

B. The Trend Toward Eliminating Jury Trials Should Be Reversed.

If an administrative agency can seek injunctive relief against a private business and destroy the business’s right to a jury trial in a subsequent proceeding, will the result be the same when an administrative or regulatory agency itself makes a finding of fact and there is a subsequent legal proceeding against the company?

New administrative agencies and new agency functions are spawned by Congress nearly every year.² The growth of these agencies and of their functions could effectively swallow the right to a jury trial, either by injunction proceedings, as in this case, or by administrative determinations of factual disputes.

The Seventh Amendment to the Constitution did not mention the role that administrative agencies, unknown at common law, would play in destroying the right to a jury trial. But the issue before the Court is whether a prior agency injunction proceeding determination of a question of fact precludes a party from entitlement to a jury trial determination of that same question of fact. Amicus contends that it can not and should not.

Administrative agencies are dominant in our society and are continuing to grow in number and in magnitude. More than twenty-five years ago Justice Jackson stated :

The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affect-

² Environmental Protection Agency, 84 Stat. 2086, 35 Fed. Reg. 15623 (1970); Occupational Safety and Health Administration, Pub. L. 91-596, 84 Stat. 1590, 29 U.S.C. Section 651 *et seq.* (1970); Consumer Product Safety Commission, Pub. L. 92-573, 86 Stat. 1207, 15 U.S.C. Section 2053 (1972); Commodity Futures Trading Commission, Pub. L. 93-463, 88 Stat. 1389, 7 U.S.C. Section 4a (1974); Employee Retirement Income Security Act, Pub. L. 93-406, 88 Stat. 829, 29 U.S.C. Sections 1001, *et seq.* (1974); Magnuson-Moss Warranty-FTC Improvement Act, Pub. L. 93-637, 88 Stat. 2186, 15 U.S.C. Sections 45 *et seq.* (1975); Mine Safety Health Administration, Pub. L. 95-164, 91 Stat. 1290, 30 U.S.C. Sections 801, *et seq.* (1977); Mining Control and Reclamation Act, Pub. L. 95-87, 91 Stat. 447, 30 U.S.C. Sections 1201, *et seq.* (1977).

ed by their decisions than by those of all the courts

FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952).

Justice Frankfurter wrote five years later that review of administrative agencies constituted the largest category of the Supreme Court's work, comprising one-third of the total cases decided on the merits. Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U.Pa. L.Rev. 781, 793 (1957).

In recent years many new agencies have been created and no major agencies have been eliminated.³ If each federal administrative agency can make factual determinations which are binding on later court proceedings then the right to trial by jury will become a vestige of history. Although administrative agencies may be efficient in determining questions of fact in large numbers of cases,⁴ the right to a jury trial is too fundamental in our Constitutional framework to give way to mere "efficiency" or expediency.

Federal administrative agencies have been handling more than ten times the number of cases as the federal district courts. For example, in the year ending June 30, 1963 there were 7,095 trials in federal district courts and 81,469 cases disposed of by the federal administrative agencies after oral hearing.⁵ Based on the proliferation of new agencies during the last fifteen years Amicus believes that the number of cases decided by

³ See n.2, *supra*.

⁴ Amicus vigorously disputes the contention that federal agencies are efficient in this regard.

⁵ K. DAVIS, *ADMINISTRATIVE LAW TEXT*, 3d Ed. 4 (1972).

the federal bureaucracy has increased more rapidly than the federal caseload. In any event the trend toward the increasing power and authority of the federal administrative agencies is undeniable.

The Supreme Court has held that there is no constitutional right to a jury trial in a hearing before an administrative agency. *See, e.g. Atlas Roofing Co. Inc. v. Occupational Safety and Health Review Commission*, — U.S. —, 97 S.Ct. 1261 (1977); *Phillips v. Commissioner*, 283 U.S. 589 (1930); *Crowell v. Benson*, 285 U.S. 22 (1932); *National Labor Relations Board v. Jones & Laughlin*, *supra*. The courts have also held that there is no right to a jury trial in a purely equitable action. *Damsky v. Zavatt*, 289 F.2d 46 (2d Cir. 1961).

In mixed cases of law and equity, however, the Supreme Court has always preserved the right to a jury trial on those questions of fact common to both categories of cases. *Beacon Theatres v. Westover*, *supra*; *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

If both the SEC injunction case and this case had been consolidated for trial under *Beacon Theatres* and *Dairy Queen* there is no doubt that a jury could have decided the common questions of fact.

The mere fact that the SEC case was not consolidated should not deprive Parklane and Mr. Somekh of their constitutional right to a jury trial. Similarly, that the SEC case was decided first⁶ should not control the question of the right to a jury trial. The race to the

⁶ However, the private action in this case was filed first. *See* 565 F.2d at 817.

courthouse or through the courthouse should not determine whether a constitutional right is preserved or destroyed.

More and more decisions which would formerly have been decided by juries are now being made by administrative agencies. This Court, and this Court alone, can reverse this dangerous trend by preserving the time-honored constitutional right to a jury trial in this case from destruction by an administrative injunction action.

III. CONCLUSION

A jury trial is guaranteed by the Seventh Amendment to the Constitution of the United States, whereas a trial to the court and collateral estoppel are not so guaranteed.

The right to a trial by jury is being eroded by injunctive proceedings and fact determinations of the burgeoning federal administrative bureaucracy. Collateral estoppel as a result of agency-sought injunctions is another example of the trend toward short-circuiting the jury trial right. This court must hold the line and reverse the trend toward extinction of the constitutional right to a trial by jury.

Respectfully submitted,

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